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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1015

LOCAL 189, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC, *Petitioners,*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	19
Conclusion	32

Appendix A	1a
Statutes Involved	1a
Appendix B	8a
Opinion of the District Court	8a
Appendix C	18a
Opinion of the Court Below	18a
Judgment	50a
Appendix D	51a
Opinion—Order of the Court Below Denying Petition for Rehearing and Petition for Rehearing *En Banc*	51a
Appendix E	52a
Executive Order 11246	52a
Appendix F	67a
Letter from the Comptroller General of the United States to the Secretary of Labor B-163026	67a

INDEX TO CITATIONS

CASES: Page

Gaston County v. *United States*, 395 U.S. 285 .....24, 27
Griggs v. *Duke Power Co.* (M.D. N.C. 1968) 292 F.2d 243 .....18, 29, 30
Louisiana v. *United States*, 380 U.S. 145 .....24, 27
Quarles v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968) 17, 18, 21, 24, 29, 30
United States v. *H. K. Porter Co.* (N.D. Ala. 1968) 296 F.Supp. 40 30

STATUTES:

Budget and Accounting Act, 31 Stat. 366; 42 Stat. 23; 31 U.S.C. 21, 74 10

Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. Sec. 2000e (Title VII) 2, 3, 5, 6, 7, 8, 9, 11, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32

National Labor Relations Act, 1947, As Amended, 61 Stat. 136; 73 Stat. 519; 29 U.S.C. 151, *et seq.* 5

28 U.S.C. 1254(1) 2

42 U.S.C. 1971 27

42 U.S.C. 1971(c)-(h) 8

42 U.S.C. 2000a-3 8

42 U.S.C. 2000c-6 8

42 U.S.C. 2000(e) to 2000(e)15 3

OTHER:

Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 72 Harv. L. Rev. 1532, 1535 (1962) 22

Bureau of National Affairs, Inc., "Basic Patterns In Union Contracts" Seniority (1965) 31

110 CONG REC. 1518 (1964) 6

110 CONG. REC. 12,723 (1964) 8

110 CONG. REC. 15,893 (1964) 8

Page

110 CONG. REC. 7205-7207 (1964) 6, 7, 32

110 CONG. REC. 7212-15 7

Executive Order 11246, 3 C.F.R. 339 (1964-65 Comp.) ..3, 10

115 CONG. REC., (daily ed.) No. 214, December 22, 1969, pp. 17623-17636 4

115 CONG. REC., (daily ed.) No. 211, December 18, 1969, pp. S17131-17157 4

Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964,* 13 How. L.J. 1 (1967) 22

Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications,* 48 Texas L. Rev. —, June 1969, at 1041 .....20, 31

H.R. Report No. 1370, 87th Cong., 2d Session (1962) .. 32

H.R. Report No. 570, 88th Cong., 1st Sess. (1963) 26

H. Rep. No. 914, Part 2, 88th Cong., 1st Sess. (1963) ..8, 26

LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, United States Equal Employment Opportunity Commission, U. S. Government Printing Office, Washington, D. C., at 3039 7

Letter of Comptroller General of the United States to the Secretary of Labor B-163026 .....4, 10, 30

St. Antoine, "Litigation and Mediation under Title VII of the Civil Rights Act of 1964," address before the Section of Labor Relations Law, American Bar Ass'n., August 11, 1969, summarized in 71 Labor Relations Reporter 626-627 .....24, 28

U. S. Equal Employment Opportunity Commission, 3rd Annual Report (1968), 91st Cong., 1st Sess., House Document No. 91-707, p. 11 9

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No.

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v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC and United Papermakers and Paperworkers, AFL-CIO, CLC, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion and order of the District Court for the Eastern District of Louisiana, entered March 26, 1968, (App. B, *infra*, pp. 7-17) is reported at 282 F. Supp. 39.[1] The opinion of the court of appeals (App. C, *infra*, pp. 17-49) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 50) was entered on July 28, 1969. The order of the court of appeals (App. D, *infra*, p. 50) denying petitioners' timely filed Petition for Rehearing and Rehearing *en banc* was entered on October 1, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964 guaranteeing equal employment opportunity for minorities and women may operate retroactively to diminish or divest the competitive status seniority acquired by white workers under plant provisions permitting different seniority arrangements for black and white employees in the period antedating the Act. More specifically, whether a job seniority system, nondiscriminatory on its face—and adopted by the parties to a collective bargaining contract in accordance with the recommendations of the Equal Employment Opportunity Commission—may be altered by injunctive court decree to give compensatory or preferential seniority to Negro employees hired prior to the effective date

[1] "App." refers to the Appendix to this petition. "R" refers to the Record, filed by petitioners with this Court, containing the trial proceedings in the district court; "Exh. Vol. 1" or "Exh. Vol. 2" refers to the exhibits introduced in those proceedings.

of Title VII of the Act (or some six months thereafter), on the ground that the seniority system in question carries forward the effects of pre-Act job discrimination based on race, notwithstanding that such disparate treatment was not then violative of the statute, which by Congressional design is entirely prospective in operation.

STATUTES INVOLVED

The pertinent provisions of Sections 701(b), 703(a), 703(c), 703(h), 705(a), 705(d), 705(g), 706(a), 706(b), 706(c), 706(e), 706(f), 706(g), 706(k), 707(a), 707(b), and 716(a), Title VII, Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C., Sec. 2000(e) to 2000(e) 15, are set forth in Appendix A, *infra,* pp. 1-7.

The provisions of Executive Order 11,246, 3 C.F.R. 339 (1964-65 Comp.), are set forth in Appendix E, *infra;* pp. 52-66.

STATEMENT

The foregoing question of statutory construction is one of first impression; no aspect of Title VII of the Civil Rights Act of 1964 has ever been in issue before this Court, nor been invoked in any previous petition for certiorari, so far as we are aware.

Review of this case would present to the Court for the first time, one of the most sensitive problems posed by the Act: namely, whether its equal employment opportunity provisions may operate to disadvantage or displace in the seniority hierarchy, white workers who, in a racially discriminatory employment climate permissible prior to the effective date of Title VII of the Act, earned greater job security through length-of-work credits than their black fellow workers.

The question whether a presently nondiscriminatory employment program is unlawful *unless it also serves*

to eliminate the present consequences of pre-Act discrimination, has fragmented the governmental agencies exercising official responsibility under Title VII of the Act, as well as the courts. The development of the instant case, serves to illuminate the conflicting interpretations and decisions that have been the order of the day in both sectors, insofar as the statutory impact upon established seniority practices is concerned.

Moreover, a split of opinion on the basic question—in the related context, however, of new hiring rather than seniority arrangements—produced a veritable collision on the national scene between the legislative and executive branches of Government, that within recent days was aired in vigorous and extended debate on the floor of the United States Senate, and the House of Representatives. The resulting stalemate over Title VII of the Act, stemmed from a clash of rulings as to the import and controlling extent of its hiring obligations, issued, on the one hand by the Secretary of Labor, supported by the Attorney General, and on the other hand, by the Comptroller General of the United States, whose office is an instrumentality of Congress. The Senate voted by a wide margin, to resolve the impasse by upholding the paramount authority of the Comptroller General and his interpretation of the statute; this action was subsequently supported by the Senate-House conferees, but disapproved by the House of Representatives. The Senate, in turn, accepted the reversal of the House, this time by a substantially narrower vote, after intensive parliamentary maneuver and further debate, preceding adjournment for the year.[2]

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[2] 115 CONG. REC., (daily ed.) No. 211, December 18, 1969, pp. S17131-17157; (daily ed.) No. 214, December 22, 1969, pp. 17623-17636. The highlights of this dispute are traced at p. 30, *infra.*

Through Title VII of the Act, Congress established a new category of unfair employment practices covering racial and other working minorities, in effect, supplementing the unfair labor practices defined by the National Labor Relations Act some three decades earlier.[3] Unlike the other segments of the Act protecting the constitutional rights of minorities in voting, housing, and education—enforcement of which does not entail the possible deprivation or dispossession of others similarly situated—Congress in the employment sphere, resorted to a grace period of one or more years,[4] as well as a wholly different set of remedies. Insofar as material here, it became an "unfair employment practice", on July 2, 1965, one year after the effective date of the Act itself, for an employer (with 100 or more employees), because of race, to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" or "to limit, segregate, or classify his employees in any way which would deprive any individual of employment opoprtunities or otherwise adversely affect his status as an employee . . ." (Sections 703(a)(1) and (2) of the Act; App. 2). Similar prohibitions directed to labor unions are set forth in Sections 703(c)(1) and (2) of the Act. (App. 2).[5]

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[3] 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*

[4] As the court below recognized: "Section 701(b) and (e) provide that for staggered effective dates: The Act applied on July 2, 1965, only to employers of 100 employees or more, extending to employers of 75, 50, and 25 at successive yearly intervals." (App. 1, 27-28).

[5] The analogy may be drawn to the union strictures incorporated in the National Labor Relations Act, as amended by the Labor Management Relations Act 1947 (61 Stat. 136, 29 U.S.C. Supp. III, 151, *et seq.*).

While considering these provisions forbidding discrimination in employment or union membership, Congress met with serious concern on the part of its labor constituency, that previously acquired seniority status would be adversely affected. Consequently, the legislative history of Title VII bears the stamp of assurance by the prime movers of the civil rights bill in both chambers, that preexisting seniority rights would remain unimpaired.

After initial passage of the bill by the House of Representatives,[6] warnings were renewed in the Senate that previously earned seniority rights would be destroyed by the inclusion of Title VII.[7] In answer to this charge, a memorandum was prepared by the Department of Justice, at the request of Senators Clark of Pennsylvania and Case of New Jersey, who served jointly as the bipartisan floor managers for Title VII

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[6] The following introductory statement was made by its floor manager, Representative Celler of New York, chairman of the House Judiciary Committee, which originated and reported out the legislation (110 CONG. REC. 1518 (1964)):

> "Finally, in order to provide an opportunity for adjustment and transition, the specific prohibitions on job discrimination would not become effective until 1 year after passage.
>
> "It has been asserted also that the bill would destroy worker seniority systems and employee rights vis-a-vis the union and the employer. This again is wrong. The bill would do no more than prevent a union, as it would prevent employers, from discriminating against or in favor of workers because of their race, religion, or national origin."

[7] Such warnings came from recognized champions of organized labor such as Senator Hill of Alabama, notwithstanding that the leadership of the AFL-CIO, including its president, George Meany, had strongly supported the civil rights bill in general, and the equal employment opportunity provisions in particular. 110 CONG. REC. 7205-7207 (1964).

in the Senate.[8] The document, introduced into the record by Senator Clark, dealt with the assertion "that Title VII would undermine vested rights of seniority," stating in part:[9]

> "This is not correct. *Title VII would have no effect on seniority rights existing at the time it takes effect . . . This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.* Title VII is directed at discrimination based on race, color, religion, sex, or national origin. *It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race.*" (Emphasis supplied.)

At the same time, a second interpretative memorandum was prepared and likewise introduced into the record, by Senators Clark and Case, who there reiterated: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retroactive."[10]

When the legislative focus reverted to the House, the foregoing guarantees were endorsed and made even

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[8] In the Senate, the bill did not go through the usual procedure of being referred to a standing committee. Therefore, in the absence of a committee report, this and other such documentary material assume an unusual degree of importance in the legislative history. LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, United States Equal Employment Opportunity Commission, U.S. Government Printing Office, Washington, D.C., at 3039.

[9] 110 CONG. REC. 7207 (1964).

[10] 110 CONG. REC. 7212-15.

more explicit by Representative McCullough of Ohio, a leading advocate of the bill as ranking minority member of the House Judiciary Committee.[11] After return of the bill with Senate amendments which left intact the nondiscrimination provisions in question (Secs. 703(a) and (c)),[12] he told the House, at a critical juncture, that it "does not permit the Federal Government to destroy the job seniority rights of either union or nonunion employees." [13] The bill was approved by House vote immediately thereafter with no further discussion of the seniority issue. The foregoing delimitation, specifically insuring "job seniority rights" against subsequent dissolution by the force of Title VII of the Act—like its counterpart in the Senate—stands without modification or challenge on the legislative record, insofar as scrutiny of the legislative history reveals.

It is noteworthy that direct court action is authorized by the other principal titles of the Act to implement the constitutional rights of all persons with respect to voting, unsegregated public accommodations, and unsegregated public school facilities.[14] In the employment area, however, Congress placed major reliance upon a five-member Equal Employment Oppor-

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[11] H. Rep. No. 914, Part 2, 88th Cong., 1st Sess. (1963).

[12] A new section, 703(h), was added authorizing different terms of employment "pursuant to a bona fide seniority . . . system" provided that the "differences are not the result of an intention to discriminate because of race . . .". (App. 3). Senator Humphrey of Minnesota explained that this section did not "narrow application" of Title VII, "but merely clarifies its . . . intent". 110 Cong. Rec. 12,723 (1964).

[13] 110 Cong. Rec. 15,893 (1964).

[14] 42 U.S.C. 1971(c)-(h); 42 U.S.C. 2000a-3; 42 U.S.C. 2000c-6.

tunity Commission (EEOC), charged with eliminating unlawful practices "by informal methods of conference, conciliation, and persuasion" (Sec. 706(a); App. 4-5). Resort to the federal district courts may be had by complainants,[15] if, after the expiration of a statutory period, the Commission—or in some instances the comparable state agency to which the Commission may have deferred—is "unable to obtain voluntary compliance" (Sec. 706(e); App. 6) or, at least, the Commission has had an opportunity to act in the matter. Thus the non-coercive processes conducted by the Commission itself constitute, under the statutory scheme, "the primary vehicle for settling complaints of discrimination" [16] filed by aggrieved persons or Commission members pursuant to Title VII of the Act.

Reference is necessary also to Executive Order 11,246, signed September 24, 1965, (App. E., *infra,* pp. 52-67), which similarly requires firms awarded government contracts to guarantee that "they will not discriminate against any employee or applicant for employment because of race" and "will take affirmative

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[15] In addition, the Attorney General may bring an action seeking to enjoin an apparent "pattern or practice of resistance" to the "full enjoyment" or "exercise" of the rights guaranteed by Title VII of the Act (Sec. 707(a); App. 7). When suit is brought pursuant to Title VII of the Act, in contrast to those filed under the National Labor Relations Act, *supra,* for example, the federal courts—rather than a regulatory agency possessing special expertise—are themselves empowered to grant injunctive relief in the first instance and initially to devise and "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ." (Sec. 706(g); App. 6).

[16] U.S. Equal Employment Opportunity Commission, 3rd Annual Report (1968), 91st Cong., 1st Sess., House Document No. 91-707, p 11.

action to insure that the applicants are employed, and that employees are treated during employment, without regard to their race" with respect to factors such as "upgrading, demotions, or transfer," (App. 54). The Office of Federal Contract Compliance (OFCC), within the Department of Labor, may order cancellation of existing government contracts and debarment from further contracts, as a sanction for violation of the nondiscrimination requirements.[17] However, the Comptroller General, functioning as an arm of the legislative branch of government,[18] maintains the right to render binding decisions with respect to the legality of all conditions or stipulations prescribed for government contractors by the Department of Labor, or any other executive agency.[19]

In this case, the courts below were called upon to determine, within the foregoing frame of reference, the

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[17] Under powers delegated by the Secretary of Labor, Executive Order No. 11,246 (App. 55), 3 C.F.R. 339, 340 (1964-1965 Comp.).

[18] The letter of the Comptroller General to the Secretary of Labor, dated August 5, 1969, (B-163026) exercising his authority in connection with Section 7 of the Act and Executive Order 11,246, is reproduced in Appendix F, *infra*, pp. 67-85. As an integral part of the legislative branch, the office of the Comptroller General has basic authority to determine the legality of all expenditures of appropriated funds and provide Congress with independent reports on the financial and management operations of the executive branch. 31 Stat. 366; 42 Stat. 23, 31 U.S.C. 21.

[19] This supervisory jurisdiction covers the broad range of contractual requirements, including wages and other employment conditions or practices; and as recently reaffirmed by the present Comptroller General, it embraces contingencies "where the Congress in enacting a statute covering the subject matter of such conditions has specifically prohibited certain actions", (App. 69). In this event, "no administrative authority can lawfully impose" contradictory prohibitions, whether more or less stringent (*Ibid.*): 28 Stat. 207, as amended by Section 304 of the Budget and Accounting Act, 31 U.S.C. 74.

adequacy of basic changes in the seniority provisions of an existing collective bargaining contract agreed upon and adopted by the bargaining unions and the employer in a joint effort to meet the requirements of Title VII of the Act.

Sharply reflected by the record were the divergent and incompatible positions assumed by the three executive agencies of the federal government which had intervened successively to take action in the matter. As the court below found (App. 22), in the first instance, the Equal Employment Opportunity Commission not only "declared that 'application of the [newly revised] seniority system, established by collective bargaining' would comply with the statute," but permitted its operation, which continued for more than a year. (R. 348-350, 350-352). Then, as the court below also found, the Office of Federal Contract Compliance "attacked what the EEOC had previously seemed to approve" (App. 23) and insisted upon the substitution of a hybrid seniority system of its own making. (R. 41-45; Exh. Vol. 1, p. 102). However, the measure advanced by the OFCC, after ultimate inauguration by the employer (Exh. Vol. 1, pp. 88-90), was in turn the object of attack by the Attorney General, on commencement of present action alleging a "pattern or practice of resistance" to Title VII of the Act. At this point, as the court below further stated, the district court was asked to "strike down the . . . [OFCC] system as illegal" (App. 24) and mandate, instead still a third seniority pattern embodying a still wider departure (R. 4-7).

These contradictory actions, posed one dilemma after another for petitioners as well as the employer, and underscore the need for an authoritative resolution of

the question urged for review. While deciding against them, the court below nevertheless conceded that it could not "help sharing" the employer's "bewilderment at the twists and turns indulged in by the government agencies in this case" with the government "now . . . asking the court" for "a stronger measure than the one requested earlier by the OFCC, which in turn had gone beyond the original position of the EEOC" (App. 24, 49).

Acknowledging the "honorable place" of seniority "in the history of labor relations", the court below made reference to a standard description of its variations, on which there is virtually universal agreement (App. 26-27 including fn. 7):

> "The use of competitive status seniority to govern promotions, demotions, and layoffs is a fundamental aspect of industrial relations in this country. In nearly all businesses of significant size whose employees are organized, a seniority system plays some role in determining the allocation of the work. Such systems are commonly accompanied by lines of progression or promotional ladders which establish an order of jobs through which employees normally are promoted.
>
> "Seniority may be measured by total length of employment with the employer ('employment,' *'mill,' or 'plant' seniority*), length of service in a department (*'departmental' seniority*), length of service in a line of progression (*'progression line' seniority*), or length of service in a job (*'job' seniority*) . . . . in all cases the basic measure is length of service, with preference accorded to the senior worker. . . ." (Emphasis supplied.)

The seniority system on which this case turns, evolved as the product of collective bargaining over the years

between the employer, Crown Zellerbach, operating a pulp and paper mill in Bogalusa, Louisiana, and the approximately 1200 wage earning employees at the mill, about 250 of whom are Negro (R. 33-34). The employees were represented by the international union, a petitioner herein, and its local affiliates, one of which, Local 189, co-petitioner herein, was composed exclusively of white employees, and the other 189A, of Negro employees (R. 34).

Job seniority is the controlling factor for determining promotion and demotion under this system, which is standard in the paper industry throughout the United States and Canada, as best comporting with both the needs of the industry for maximum on-the-job training of employees at each progressive level and their reasonable expectations of job security (R. 143-148, 293). Accordingly, the collective bargaining agreement provided for several "lines of progression" in which groups of jobs (as few as two or as many as twenty-one) are segmented on a functionally related basis, so that ordinarily experience in one serves as training for the next higher in that particular progression line, with the lowest pay at the bottom and the highest pay at the top of the line (R. 142-143; Exh. Vol. 1, 103-155). When a vacancy occurs in a given progression line, the qualified incumbents in the job "slot" immediately below (usually about four), compete for the promotion, which is awarded the employee with the greatest length of service in the job below (R. 37). Thus, seniority credit for promotion within lines of progression is based upon the length of time spent in each job, with no credit given for length of service in the plant. If, however, the *job seniority* of competing incumbents is equal, the competition reverts

to *mill seniority* and the employee with the greater length of total mill employment is entitled to move upward.

Supplementing the progression lines were two labor pools, known as the "Extra Boards", where newly hired employees awaited the opportunity to fill temporary and permanent vacancies in the progression lines (R. 36).[20]

Prior to May 17, 1964 certain jobs at the mill, the corresponding progression lines, and some departments, were reserved exclusively for white employees; the other jobs were restricted to Negro employees in separate lines of progression (R. 35-36). The Extra Boards were likewise separated, with jurisdiction divided between the two local unions on this basis (R. 35-36); correspondingly, white applicants for employment were hired on the basis of vacancies on the Extra Board within the jurisdiction of Local 189, and Negro applicants on the basis of vacancies on Local 189A's Extra Board. These employees were then eligible only for vacancies in the progression lines under the jurisdiction of their respective unions. (R. 36-37).

A major change took place on May 17, 1964, when the two Extra Boards were merged, so that Negro employees became eligible to move into any progression line in the mill, including those formerly restricted to white employees, on the same basis as other Extra

[20] When permanent vacancies occur in a progression line, members of the Extra Board and employees in other progression lines bid for the assignment on the basis of mill seniority (R. 37). If an employee is demoted, due to a reduction in force in a progression line, he normally would revert to the Extra Board with a "recall right" to the first opening at the bottom of the progression line from which he was demoted (R. 37).

Board employees (R. 37). About one year later, in May of 1965, and prior to the effective date of Title VII of the Act, racial restrictions were further removed by a "transfer provision" that allowed any qualified individual in the mill, regardless of race, including those on the Extra Board, to bid, on the basis of mill seniority, for vacancies at the entry point in any progression line at the mill. (R. 343, 345).

Following the effective date of Title VII of the Act, extensive negotiations were conducted between the Locals, Crown, and the Equal Employment Opportunity Commission, resulting in merger and intermeshing of the formerly segregated progression lines, in accordance with the detailed recommendations of the EEOC, so that promotions were open to whites and Negroes without discrimination, with job rates likewise nondiscriminatory (R. 346, 348-350). High ranking representatives of the EEOC, including its then Chairman, stated that the "seniority agreement [i.e., *job seniority* system] established by collective bargaining" was an appropriate vehicle for the necessary alterations (R. 348-349; Exh. Vol. 1, pp. 12-14), which thereupon were incorporated by amendment in the master collective bargaining agreement covering the mill employees on January 16, 1966 (R. 38-49; Exh. Vol. 1, pp. 17-31). After public commendation from the EEOC and institution of the changes advocated by that agency, the newly revised job seniority system governed promotions, demotions, and layoffs at the plant for the next thirteen months (R. 348-350; Exh. Vol. 1, pp. 15-16).

At this point, in February of 1967, these arrangements were challenged for the first time as discriminatory by the Office of Federal Contract Compliance

which demanded, under the authority of Executive Order 11,246, that a so-called combination seniority system—devised by its staff and new to the industry—giving credit for both job and mill seniority, be substituted as the determining factor in promotions and demotions (R. 39-40, 49, 301-302; Exh. Vol. 2, pp. 346-347). Under the "mill-plus-job" criterion advanced by the OFCC, total employment time with the company would be added to that spent in the job which the employee held, to determine his relative seniority status; and this standard would not only govern the competition or promotion of Negro employees competing with white employees, but of white employees who, in some circumstances, were competing only against each other (R. 49, 301-302).

Extensive negotiations, from which the Locals were excluded, were carried on between Crown and the OFCC until the end of the year 1967 (R. 40-42). Meanwhile, there were concurrent negotiations between Crown and the Locals in an effort to find an acceptable substitute for the OFCC-sponsored system, to which they objected (*Ibid.*).

In January, 1968, Crown, under threat from the OFCC of debarment from future government contracts, notified the Locals of its intention to install the combination seniority system on February 1, 1968 (R. 46; Exh. Vol. 1, p. 90). Local 189 voted to strike in order to forestall the impending unilateral change in the seniority system previously established by collective bargaining (R. 46). Thereupon, the Attorney General, on behalf of the Government, filed suit in the district court under both Section VII of the Act and

premise that "the legislative history is singularly uninstructive on seniority rights" (App. 28). It is impossible, by any standard, to reconcile this sweeping disclaimer of the court below with the direct and fully explanatory articulation of Congressional intent this widely publicized issue evoked, as even a cursory appraisal of the unequivocal statements forthcoming in both Houses will confirm.

Any trace of ambiguity—and we think there was clearly none—left by the treatment of the seniority issue in the Senate (pp. 6-7, *supra*), would have been removed by the terse clarification Representative McCullough offered on the floor of the House of Representatives just prior to the final vote on the Act, completing its course through the Congress. The court below—as well as the district court opinion in *Quarles* v. *Philip Morris, Inc., supra,* upon which it relied "heavily" in this regard (App. 27, fn. 7)—completely ignored this barrier against interfering with the existing "job seniority rights of union or nonunion employees" that was raised, without dissent, at the height of the legislative process (p. 8, *supra*). It is beyond dispute that such "rights", as commonly understood then and now, represented the acquisition over a period of time of concrete and measurable employment gains which, in the further and unequivocal words of Representative McCullough's comment, "the bill does not permit the Federal Government to destroy" (*Ibid.*). There is no reference whatsoever to this decisive chapter of the legislative history in the decision below.

The scope and significance of the foregoing construction of Title VII, together with the interpretative

memoranda immunizing "established seniority rights" submitted by the floor managers of the legislation in the Senate (pp. 6-7, *supra*) is transparent. Visualizing the immediate context, it will be recalled that the nation's industrial workers and trade unions were fully alerted to the issue at stake when, as the court below recognized (App. 28): "Opponents of the Act warned that Title VII would destroy hard-earned seniority rights; proponents responded that it would not affect accrued seniority".[23]

In seeking to assuage the widespread apprehensions that had been raised, prominent members of Congress were not addressing their colleagues in parliamentary language; rather they were communicating in familiar employment terms, invested with the most precise meaning and usage in the everyday working life of millions of industrial employees. For them, job security, as represented by seniority, was of foremost importance;[24] developments in Congress would have far-reaching impact upon their economic security, and other vital aspects of their employment, both present and future. They, of course, knew equally well from experience that seniority may be computed on the basis of time worked anywhere in the plant, in a particular department, a "line of progression", or a given job, except that "departmental" or "job" seniority is more general in industry, especially for promotion purposes.

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[23] See, p. 6, fn. 7, *supra*.

[24] Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 72 Harv. L. Rev. 1532, 1535 (1962); Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 How. L. J. 1 (1967).

In these circumstances, it is inconceivable that veteran legislators acting on a bipartisan basis, would seek covertly to use an industrial relations term like "seniority" in an entirely unconventional and distorted sense to connote only "employment" (plant) seniority, at the same time excluding its other major gradations such as "departmental" or "job" seniority. Nevertheless the view of the district court in *Quarles, supra,* relied upon by the decision below, is that the legislative references in question "are clearly to employment seniority", at least where pre-Act discrimination is involved, but not to "departmental" seniority, about which the legislative history "contains no express statement," according to this approach (App. 28-29). Neither, it may be observed in passing, is there any specific reference to "employment" seniority, anywhere in the pertinent legislative annals.[25] While this is not essential to our thesis, Representative McCullough when even beyond "departmental" seniority, in centering the attention of the House on the protection of the "job seniority", held by nonunion as well as

[25] The court below likewise concurred with the *Quarles* decision in concluding "that the treatment of 'job' or 'department' seniority raises problems different from those discussed in the Senate debates", on the tenuous theory that they had no application to seniority acquired in formerly segregated plants but only to plants that formerly barred Negroes from employment (App. 43). This attempted distinction fails, not only for the reasons outlined above, but because the Clark-Case memorandum in the Senate dealt expressly with formerly segregated plants, in stating (p. 7, *supra*): "Title VII would have no effect on seniority rights existing at the time it takes effect . . . . [E]ven in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes."

union employees. It is clear in all events that, as stated by a scholar in this field: [26]

> "The proponents of Title VII would thus have been only half-answering Senator Hill—and incidentally deceiving the labor movement—if their remarks on seniority did not have general applicability. Certainly there is not a whisper of anything affirmative to support the *Quarles'* distinction."

2. The court below erred in equating the statutory rights, the reach of which were at issue in this case, with the constitutional voting rights accorded the equal proection of laws in *Louisiana* v. *United States,* 380 U.S. 145 and *Gaston County* v. *United States,* 395 U.S. 285 (App. 34-35). These cases are inapposite. The decision below, nevertheless, places improper reliance upon them as authority for the proposition that Section VII of the Act similarly grants "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past" (*Ibid.*). This construction provides another bridge to an even wider judicial departure from the expressed legislative intent and should be corrected by the exercise of this Court's supervisory powers.

Enactment of Title VII, in the main imposed on employers, unions, and employment agencies, the statutory duty to refrain from certain unfair employment practices and granted employees correlative fair or equal employment rights in their employment relationship. These rights and corresponding duties, like those

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[26] Theodore J. St. Antoine, "Litigation and Mediation under Title VII of the Civil Rights Act of 1964", address before the Section of Labor Relations Law, American Bar Ass'n., August 11, 1969, summarized in 71 Labor Relations Reporter 626-627.

the Executive Order, initially to enjoin the strike,[21] but subsequently to attack as illegal the OFCC seniority system, which had been placed in operation on February 1, 1968 (R. 47), and request for the first time, the substitution by court mandate of a system based entirely on plantwide seniority (R. 3-7, 15, 70, 72). Local 189A and two Negro employees at the mill, bringing a class suit, were permitted to intervene as plaintiffs-intervenors.

The district court held that the job seniority system in effect prior to February 1, 1968, while not inherently prejudicial, operated to continue the effects of past discrimination, and under the principles of *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E. D. Va. 1968), must be replaced by a mill-wide seniority system to determine, on the basis of total length of employment, the seniority status of any Negro hired prior to January 16, 1966 (when the progression lines were merged) who was competing against white employees for a change in employment status (involving promotion, demotion, or selection for training) (App. 9, 14-15); also, the court found the job seniority system unlawful under both Title VII of the Act and Executive Order 11,246 (App. 14).

The judgment of the district court was affirmed by the court below, which held that a seniority system based on pre-Act work credit constitutes "present and future discrimination" and that job seniority here

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[21] The suit was filed on January 30, 1968; on the following day, the district court granted the strike injunction sought by the government (R. 8). There were eleven other stipulated issues heard later as separable from the two related to seniority (R. 479).

The two Locals are now under a district court order issued on September 11, 1968, providing for their merger.

"embodying as it does the racially determined effects of a biased past, constitutes a form of present racial discrimination" (App. 19, 20, 34). The court below did not discuss Executive Order 11,246, but based its decision entirely on Title VII of the Act, which it held both Crown and the petitioners had transgressed by "carrying forward exclusion of a racially determined class" without the justification of business necessity and beyond the limits required for safe and efficient operation of the mill (App. 33, 49); it therefore ruled with respect to Negroes hired before January 16, 1966, that their total employment time at the mill must be "equated with [the] white seniority," acquired in any particular job (App. 20).

The court below agreed with the approach of the district court in *Quarles* v. *Philip Morris, Inc.*, (E.D. Va. 1968) 279 F. Supp. 505, including the view that the legislative history of Title VII does not mitigate against overriding pre-Act seniority, and rejected the contrary holding of the district court in *Griggs* v. *Duke Power Co.*, (M.D. N. C. 1968) 292 F. Supp. 243, arising in the same judicial circuit, which held that discrimination prior to July 2, 1965, is not cognizable under Title VII of the Act.

While conceding that the Equal Employment Opportunity Commission had "seemed to approve" the seniority system now condemned by the present judgment (App. 23), the court below held that since this affirmative sanction, although in writing, was not transmitted by a formal "opinion letter" signed by the Commission's General Counsel, it did not, under Section 713(b) of the Act, constitute a bar to the suit brought by the Government or the private plaintiffs (App. 47-48).

REASONS FOR GRANTING THE WRIT

The decision below presents in justiciable form, a novel and important question of federal law which has not been, but should be, settled by this Court. Petitioners urge review, independently of whether or not we prevail on the merits, as vital not only to the more effective utilization of Title VII of the Act under present circumstances, but to the attainment of its long range potential, which, from our disturbing experience in this and companion cases, we believe is all too far from realization. In this analysis, the assumption of jurisdiction by this Court, likewise would further the broad civil rights objectives envisaged by Congress in the other major sections of the Act.

Conversely, a trend inimical to the successful operation of Title VII, and the Act as a whole, can only be aggravated by prolongation of the present state of affairs. The crux of the matter is that, while over four years have elapsed since Title VII of the Act became effective, a deep undercurrent of confusion persists at many levels, due to enforcement of its provisions affecting seniority, as in the judgment below, in a manner that seemingly does violence to the clearly expressed Congressional intent. The result is that voluntary settlement of cases through conciliation or otherwise, is impeded; burdensome litigation, with costs that threaten to tax the resources of parent unions, is difficult to avoid; and even more seriously, labor unrest is fomented when workers believe themselves unjustly displaced and deprived of earnings or promotions, rightly theirs.

At best, the difficulty in readjusting and accommodating diverse interests under foward looking employment

reform legislation, like Title VII of the Act, cannot be underestimated. But where the relative rights of seniority are affected, it is axiomatic that improvement of one employee's status inevitably depreciates that of another. In the same vein, labor authorities agree, that "whether one worker stands ahead of another for promotion, transfer, and layoff purposes is a . . . volatile issue even without the racial factor." [22]

Consequently, while it is petitioners' conviction that the decision below is demonstrably in error and requires reversal, our plea does not rise or fall with the success of this contention. The present roadblock is created by the apparent administrative and judicial disregard of a simple pledge made by the Congress to safeguard existing seniority status, under a major innovation in the federal law governing industrial relations. Primarily, therefore, we seek expeditious review—not victory at all costs. In the event it were held that we are mistaken and the Act must be interpreted otherwise, petitioners (and, we believe, other like unions) are prepared to demonstrate their capacity, as has been aptly stated, "to accept the initially unpalatable, once . . . convinced of the essential fairness of the process by which they lost." By the same token, reliance upon voluntary techniques, including those emphasized in Title VII of the Act, (p. 9, *supra*), would again become the most promising and, indeed, only rational approach to case-by-case settlement and, ultimately, a new equilibrium on a regional and nationwide basis.

1. The decision below is highly vulnerable in its entirety because it proceeds initially on the incorrect

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[22] Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications,* 48 Texas L. Rev. —, June 1969, at 1041.

"strict", "loose", or "flexible" constructionists.[33] The decision of the court below and that in the *Quarles* case, *supra,* are cited as examples of "loose" construction or a relaxed attitude toward the statute, which finds a seniority system, racially neutral on its face, violative of the Act because it fails to undo the consequences of past discrimination against long-time Negro employees who are handicapped for lack of seniority in the newly available jobs.

The decision in *Griggs* v. *Duke Power Co., supra,* is the prototype of the "strict constructionists," and takes sharp issue with the *Quarles* court on the ground that "in providing for prospective application only, Congress faced the cold hard fact of past discrimination and the resulting inequities . . . [and] realized the practical impossibility of eradicating all the consequences of past discrimination' " (292 F. Supp. at 248). The court concluded that since the seniority discrimination complained of "occured prior to July 2, 1965, it is not remedial under the 1964 Civil Rights Act" (*Ibid.*).[34]

The "flexible" constructionists, in this analysis, avoid a "dogmatic" approach and stress the "par-

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[33] St. Antoine, *supra,* p. 24, fn. 26.

[34] With respect to the contrary view in *Quarles* v. *Philip Morris, Inc., supra,* the *Griggs* court stated (292 F. Supp. at 249):

> "*If the decision in Quarles may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise.* The text of the legislation redounds with the term 'unlawful employment practice.' There is no reference in the Act to 'present consequences.' Moreover, under no definition of the words therein can the terms 'present consequences of past discrimination' and 'unlawful employment practice' be given synonymous meaning." (Emphasis supplied.)

ticular facts".[35] The point we wish to emphasize is that employees residing in Virginia (the *Quarles* case), North Carolina (the *Griggs* case), and Louisiana (the instant case), for example, have had their job expectancies determined in contrasting ways by judicial decree, with a resulting "checkerboard" or uneven application of the law that continues apace.

On another level, the element of doubt that still pervades the administration of Title VII was dramatized by the ruling of the Comptroller General that the so-called Philadelphia Plan, promulgated by the Department of Labor, was illegal in that it imposed a quota system on contractors in the hiring of minority workers in violation of Title VII of the Act, and did not merely set "goals", to be met in "good faith", as its proponents contended (App. 67-85). The Attorney General issued an opinion supporting the Department of Labor.

While the controversy centers around discrimination in hiring rather than seniority standards, the common denominator is the difference of opinion with respect to—as stated by the Comptroller General—"overcoming the present effects of past discrimination by labor unions" (App. 82-83). In evaluating the Department's "purpose of correcting the effects of discrimination by unions prior to the Civil Rights Act of 1964" (App. 79-80), the Comptroller General noted the disparity in the decided cases and the absence of a "firmly established weight of judicial precedent" (App. 85).

Suffice it to say that the controversy, which raged for several days in the halls of Congress, is spread over many pages of the Congressional Record (p. 4,

[35] E.g. *U. S.* v. *Porter*, 296 F. Supp. 40.

fn. 2, *supra*) and the daily newspapers across the nation. The Senate, through a rider to an appropriations bill, sought to uphold the paramount authority of the Comptroller General and his ruling, but acquiesced in the reversal of its action by the House, thus leaving the issue in its former posture. While the debate involved such issues as the Comptroller General's authority, it focused also on the substance of Title VII and the intent of Congress with respect to its hiring provisions.

The President and the Secretary of Labor intervened publicly and civil rights organizations were involved peripherally.

The net result is that this episode, together with the factors we have reviewed immediately above, serves to feed the fires of doubt as to the Congressional intendment and stimulate litigation rather than voluntary settlement. It is clear, however, that Congress did not wish to unnecessarily disturb seniority arrangements,[36] which are complex in nature, and are contained in about ninety percent of all collective bargaining contracts.[37] These provisions do not respond favorably to the surgical knife of federal court decree and are best suited to revision by the bargaining parties.

4. We freely concede that Congress, had it so desired, might have concluded that traditional seniority interests should be sacrificed in the effort to accelerate the progress of Negro workers who had fallen behind because of disparate treatment in years past. How-

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[36] See Gould, p. 1041, fn. 22, *supra*.

[37] Bureau of National Affairs, Inc. "Basic Patterns In Union Contracts" Seniority (1965).

ever, as we have suggested, there is cogent reason to conclude that Congress did not do so and its judgment should be respected. In any event, the debate on this question should be ended by this Court.

Petitioner, the international union, is a member of the AFL-CIO, whose leadership has long been in the forefront of those advocating the passage of Title VII of the Act and earlier legislation of the same nature.[38] Beyond this, petitioner represents both white and Negro employees, as in this case, who must work in harmony, side-by-side at the wheels of industry and in union affairs. We seek to improve the functioning of Title VII in all of its aspects and present this petition in that spirit.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[38] 110 CONG. REC. 7205-7207 (1964); H. R. Report No. 1370, 87th Congress, 2nd Sess. (1962).

under the National Labor Relations Act, are in the employment sphere and do not embrace the public at large. By the same token, they are not constitutional rights and Congress did not so regard them, notwithstanding that Title VII is lodged in an Act that at the same time implements the constitutional rights of minorities in voting, as well as unsegregated public accommodations and school facilities.

Enforcement of the voting and other constitutional rights of minorities does not entail circumscribing in any measure the exercise of these rights by other citizens in the ranks of the majority. No other voter is deprived of his ballot or its effective use; no other hotel patron is deprived of his hotel room or reduced to inferior accommodations; no other student is deprived of his seat in the classroom or the text books that were formerly his.

Our review of the legislative history has shown that Congress was acutely aware of the contrast presented by the impact of Title VII of the Act, and the danger of depriving incumbents of their job or seniority standing in that job. Thus preferential treatment or "reverse discrimination" for minorities is flatly prohibited (App. 43). We believe that Congress made its intention equally clear with respect to seniority that accrued prior to the effective date of Title VII.

There are other obvious indicia to the same effect in the framework of the statute itself. The court below took note of the staggered effective dates for Title VII, which postponed coverage of employees of smaller concerns until as late as July of 1968 (App. 27-28); this disparity would be incongruous, however, if it pertained to a constitutional right. The muted enforcement procedures as compared with those provided

elsewhere in the Act and the prominence accorded voluntary settlement techniques (pp. 8-9, *supra*), constitute still another indication of the Congressional awareness.

If more were needed, there is the blunt statement in the Clark-Case memorandum received by the Senate, that in the event a worker, who has acquired less seniority than his fellows because of pre-Act discrimination, "is laid off or denied a chance for promotion . . . under established seniority rules . . . [,] he is not being discriminated against because of race" (p. 7, *supra*). Beyond this, the legislative history is replete with statements that the effect of Title VII "is prospective and not retroactive" with respect to established seniority (*Ibid.*).

Finally, in this regard, antecedent portions of the legislative history demonstrate without question that it was an economic,[27] not constitutional end, that Congress frankly was pursuing through Title VII because the "rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them." [28]

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[27] H. R. Report No. 570, 88th Cong., 1st Sess. 2-3 (1963).

[28] H. Rep. No. 914, Part 2, 88th Cong. 1st Sess. (1963). The following excerpt further epitomizes the Congressional evaluation of Title VII and the caliber of rights there granted (*Ibid.*):

> "In other titles of this bill we have endeavored to protect the Negro's right to first-class citizenship. Through voting, education, equal protection of the laws, and free access to places of public accommodations, means have been fashioned to eliminate racial discrimination.
>
> "The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to a graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty."

It is clear, therefore, that Congress affixed its own imprimature and prospective timetable to Section VII of the Act. The court below, in reaching back on the mistaken theory that constitutional rights are involved, has substituted judicial for legislative judgment, and has torn Title VII out of its sequence in the text of the Act, in effect placing it alongside of Title I (voting),[29] where it does not belong. The reliance of the court below on *Louisiana, Gaston County* and other constitutional rights cases (App. 35) finds no support in the Constitution, the decisions of this Court, or the Act itself.

3. The formidable disruption in normal labor relations and collective bargaining patterns occasioned by the discordant views of the federal agencies and courts toward the pivotal issue here, is vividly illustrated by the experience of the employees, both white and Negro, in this case, who were subjected to three different and major changes in their expectations of job progression, two of them within a few months of each other on a government or court mandated basis.

After conferring personally with the Chairman and Executive Director of the Equal Employment Opportunity Commission, representatives of the Locals and Crown implemented their recommendations by negotiating appropriate changes in the collective bargaining contract. This solution, which held sway for more than a year, represented a formula of compliance with the statute to which the EEOC gave its endorsement nationwide during the first several years following enactment of Title VII.[30]

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[29] 42 U.S.C. 1971.

[30] Conciliation Agreement Between EEOC and Federal Paper Board Co., July 22, 1966 [1965-1968 Transfer Bender] CCH EMP. PRAC. GUIDE, Sec. 8100.

While Local 189 objected strenuously to the seniority plan insisted upon by the Office of Federal Contract Compliance, when that agency intervened without any contact with the Locals, acceptance would have been unavailing in any event because the Attorney General attacked the OFCC plan as illegal shortly after its installation by Crown.

The EEOC was the agency created by Congress, with the necessary tools and funds, to assume expertise and facilitate settlements such as the one effectuated in this case (Sec. 705(a), App. 3-4). If petitioners could not look to the Chairman and Executive Director of this organization for authoritative guidance, its membership might well ask to whom they should look.[31]

The judicial decisions likewise fall on all sides of the question on which we seek review, so much so that a new legal jargon has emerged to catalogue the array of cases.[32] Professor St. Antoine classifies the cases dealing with the present effects of past discrimination according to whether the courts are

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[31] The court below acknowledged that leading decisions of this Court require that it "give great weight to an agency's interpretation of the statute that it administers" (App. 47-48), but failed to heed this admonition for the avowed reason that the recommendations were not in the technical form required by Section 713(b) of Title VII to estop government or private suit (p. 18, *supra*). We have no quarrel with this finding but it does not obscure the conclusion that only lip service was paid the principle of administrative law stressed by this Court. Whatever the legal niceties, the by-product was disillusionment on the part of rank and file employees.

[32] The court below reviews them in such terms as a "status quo" theory, under which the arrangements which it struck down would have been approved, and a "rightful place" theory, identifying the decree upheld in this case and the philosophy that guided the hand of the district court in fashioning it (App. 30-31).

APPENDIX

APPENDIX A

STATUTES INVOLVED

Sections 701(b) (42 U.S.C. 2000b), 703(a) (42 U.S.C. 2000e-2(a)), 703(c) (42 U.S.C. 2000e-2(c)), 703(h) (42 U.S.C. 2000e-2(h)), 705(a) (42 U.S.C. 2000e-4(a)), 705(d) (42 U.S.C. 2000e-4(d)), 705(g) (42 U.S.C. 2000e-4(g)), 706(a) (42 U.S.C. 2000e-5(a)), 706(b) (42 U.S.C. 2000e-5(b)), 706(c) (42 U.S.C. 2000e-5(c)), 706(e) (42 U.S.C. 2000e-5(e)), 706(f) (42 U.S.C. 2000e-5(f)), 706(k) (42 U.S.C. 2000e-5(k)), 707(a) (42 U.S.C. 2000e-6(a), 707(b) (42 U.S.C. 2000e-6(b)), 716(a) (42 U.S.C. 2000e-15(a)), Title VII, Civil Rights Act of 1964, provide in pertinent part:

* * * * * * * * * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

DEFINITIONS

SEC. 701. For the purposes of this title—

* * * * * * * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * * *Provided,* That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: * * *

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * * * * * * *

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * * * * * * * * *

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate. * * *

* * * * * * * * * *

(d) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

* * * * * * * * * *

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any

of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.

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PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter re-

ferred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. * * *

* * * * * * * * * * *

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. * * *

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (pro-

vided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

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(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice).

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(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reason-

able attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

* * * * * * * * * *

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, * * *

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SEC. 716. (a) This title shall become effective one year after the date of its enactment.

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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

March 26, 1968

Civil Action No. 68-205 Section B

UNITED STATES OF AMERICA by RAMSEY CLARK, Attorney General

versus

LOCAL 189, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; and CROWN ZELLERBACH CORPORATION

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Order

HEEBE, District Judge

This cause having come on for hearing on the motion of the United States for a preliminary injunction against the defendants, as well as a trial on the merits of the complaints of the United States and the plaintiff-intervenors, Anthony Hill, David Johnson, Sr., and Local 189a, United Papermakers and Paperworkers, for permanent injunctive relief,

IT IS NOW THE ORDER OF THE COURT that, for the reasons assigned, the relief sought be, and the same is hereby, GRANTED to the following extent:

(a) The defendants Crown Zellerbach Corporation and Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC, and United Papermakers and Paperworkers, AFL-CIO, CLC, their officers, agents, employees, servants and all persons and organizations in active concert or participation with them, are hereby ENJOINED and RESTRAINED, pending the further orders of this Court, from discriminating against the Negro employees of the defendant Crown

Zellerback Corporation's paper mill at Bogalusa, Louisiana, in violation of Title VII of the Civil Rights Act of 1964, and in particular, the defendants are hereby ORDERED to ABOLISH forthwith the system of "job seniority" and any other seniority system designed to discriminate against the Negro employees at said plant or having the effect of so discriminating, insofar as such systems may apply to the promotion, demotion, or selection for training of Negro employees hired prior to January 16, 1966 in competition with employees of the opposite race; and the said defendants are ORDERED to ESTABLISH, with respect to such promotions, demotions and selection for training, and in the place of such "job seniority" or similar systems, a system of "mill seniority" as follows:

(1) Total mill seniority (i.e., the length of continuous service in the mill) alone shall determine who the "senior" bidder or employee is for purposes of permanent or thirty-day promotions, or for purposes of demotion in all circumstances in which one or more of the competing employees is a Negro employee hired prior to January 16, 1966;

(2) For jobs which operate only one shift per day, promotions to fill casual or vacation vacancies will be made on the same basis as permanent and thirty-day promotions;

(3) For jobs which operate more than one shift per day, promotions because of casual or vacation vacancies will be awarded to the senior (as determined in (1) above) qualified man on the shift and/or machine where the vacancy exists;

(4) Promotions and demotions above shall not affect persons who have formal written waivers in effect at that time. Persons promoted shall go around a waived position in any job slot, and persons demoted shall likewise go around such a position on the way down;

(5) Qualified employees shall be selected for training on the same basis as for promotion described above.

The provisions of this decree pertaining to the implementation by the defendants of a system of "mill seniority" shall be placed into effect within ten days from the entry of this order; prior to the implementation of the said "mill seniority" system, the defendants are ENJOINED and RESTRAINED from interfering and failing to comply with the agreement of March 19, 1967, as modified by the agreements of June 16, 1967 and January 3, 1968, between the defendant Crown Zellerbach Corporation and the Office of Federal Contract Compliance of the United States Department of Labor.

(b) The defendant Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC, and United Papermakers and Paperworkers, AFL-CIO, CLC, their officers, agents, members, employees, servants, and all persons and organizations in active concert or participation with them, are ENJOINED and RESTRAINED, pending the further orders of this Court, from interfering with or hindering, by striking, threatening to strike, or otherwise, the compliance by the defendants with the foregoing provisions of this order.

REASONS

This action was filed by the Attorney General on behalf of and in the name of the United States on January 30, 1968, against Local 189 of the United Papermakers and Paperworkers, AFL-CIO, CLC (all the members of which are of the white race), its parent union, the United Papermakers and Paperworkers, AFL-CIO, CLC, and Crown Zellerback Corporation, seeking relief for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and from interference with the implementation of Executive Order 11246, 30 F.R. 12319 (September 28, 1965), forbidding racial discrimination in employment opportunities by government contractors. On February 15, 1968, Local 189a, United Papermakers and Paperworkers, AFL-CIO, CLC, (all the members of which are Negroes), David Johnson, Sr., and Anthony Hill, both of whom are

Negro employees of Crown Zellerbach and members of Local 189a, filed a motion for leave to intervene as parties plaintiff herein and as class representatives. By orders of February 21, 1968 and March 8, 1968, this Court granted such leave and a complaint in intervention was filed. On March 20, 1968, this cause came on for hearing on plaintiff's motions for preliminary injunctions against defendant unions and against defendant Crown, and on the prayers for permanent injunctions by plaintiff and plaintiff-intervenors. By stipulation of the parties pursuant to Rule 42(b), the hearing was limited to the following issues:

> "(a) Whether, under the facts and circumstances of this case, the job seniority system which was in effect at the Bogalusa paper mill prior to February 1, 1968, was unlawful?
>
> "(b) If the answer to the above question is in the affirmative, what is the necessary or appropriate standard or guideline for identifying the seniority of employees for purposes of promotion and demotion?"

All other issues in this case were not submitted to the Court but were expressly reserved for the hearing which all parties agree will commence on April 30, 1968.

We find, as a matter of fact, (1) that Crown and the white local actively engaged, prior to January 1966, in a pervasive pattern of discrimination against the Negro employees at Crown's Bogalusa paper mill with respect to employment opportunities of promotion, demotion and selection for training; (2) that the continuation of the "job seniority" system, or any seniority system which incorporates job seniority as a substantial factor in promotion, demotion and selection for training, operates, because of the situation engendered by the pervasive past discrimination by the defendants at Crown's Bogalusa paper mill, to effectively presently discriminate against Negro employees at the mill whenever Negro employees hired prior to January 1966 compete against white employees for pro-

motion, demotion or selection for training; (3) that a system of "mill seniority," as defined in the Collective Bargaining Agreement between Crown and the local unions presently in force at the Bogalusa plant, would not have such a continuing discriminatory effect against the Negro employees; and (4) that "job seniority," as a consideration in the promotion and demotion of employees within a particular line of progression and in the selection of employees for training, is not necessitated by safety or efficiency factors, nor for any other reason is "job seniority" objectively a better or more desirable basis than "mill seniority" for promotion, demotion or selection for training of employees within the context of the present lines of progression in force at Crown's Bogalusa paper mill.

As a matter of law, we hold that this Court has jurisdiction of this action under 42 U.S.C. § 2000e-6(b) and 28 U.S.C. § 1331 and § 1345, and that discrimination against Negroes with respect to employment opportunities at this mill is properly subject to attack by the government pursuant not only to Title VII of the Civil Rights Act of 1964,[1] but also under § 209 of Executive Order 11246.[2] That order, like the order in *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967), is to be accorded the force and effect of statutory law. 375 F.2d 632, n. 1 and text.

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[1] The parties have stipulated that Crown is an employer within the meaning of 42 U.S.C. § 2000e(b) and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. § 2000e(h), and that Local 189 and its parent union are labor organizations within the meaning of 42 U.S.C. § 2000e(d) and are engaged in an industry affecting commerce within the meaning of 42 U.S.C. 2000e(e).

[2] The parties have stipulated that, "Since at least 1961, the defendant, Crown, has supplied materials under government contracts and subcontracts, which contain equal employment opportunity clauses similar to or the same as those appearing [in] the Executive Order 11246 and Executive Order 10925, to the extent required by those orders."

The white local is not immune from suit or injunctive process of this Court by reason of the general terms of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* Even prior to the enactment of Title VII, the Supreme Court had held that racial discrimination by a union was not sanctioned or protected from corrective court orders by the Norris-LaGuardia Act. *Virginian R. Co.* v. *System Federation,* 300 U.S. 515 (1937); *Graham* v. *Brotherhood of Firemen,* 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774 (1952). These decisions were not predicated on any peculiarity in the anti-discrimination provisions of the Railway Labor Act, *Textile Workers Union of America* v. *Lincoln Mills,* 353 U.S. 448, 458 (1957), and we find the holdings of these cases equally applicable to the provisions of Title VII and Executive Order 11246. Merely because § 706 of Title VII, 28 U.S.C. § 2000e-5(h), (authorizing private suits for the correction of Title VII violations), contains an express exemption from the anti-injunction provisions of the Norris-LaGuardia Act, while § 707, 280 S.C. § 2000e-6, (authorizing civil actions by the Attorney General), does not, fails to influence our holding. Section 707 provides, in the broadest possible language, for the protection of Title VII rights by suit by the Attorney General seeking "permanent or temporary injunction, restraining order or other order against the person or persons responsible . . . as [may be] necessary to insure the *full enjoyment* of Title VII rights." 42 U.S.C. § 2000e-6(a). This language cannot be read to prohibit the remedy against unions which may be responsible for Title VII violations. Title VII read as a whole forbids such a restrictive interpretation. Section 2000e(a) defines "person" to include "one or more individuals, *labor unions,* . . .;" 2000e-2(c) specifically lists the acts of labor organizations which constitute "unlawful employment practices" under Title VII; § 2000e-2(c)(3) makes it unlawful for a labor organization "to cause or attempt to cause an employer to discriminate against an individual in violation of [Title VII]." To hold such unlawful union

practices subject to injunctive remedies sought by individuals under § 706 and not to the Attorney General seeking to correct what will usually be much more serious and pervasive "patterns or practices of resistance" under § 707 would be inconsistent and irrational, and destructive to the national achievement of the basic aims of Title VII.

It is undisputed—in fact the ultimate facts compelling the conclusion have been stipulated by all parties—that prior to May 1964 Crown followed an active program of discrimination in employment opportunities against its Negro employees at its Bogalusa plant, and that not until January 1966 were considerations of race fully obliterated with respect to the job opportunities of the employees at the plant. Although not equally responsible for this situation, the white local was in good measure at fault: the discrimination against Negro employees was possible because Local 189 was all white, and Negro employees excluded from that local had an organization of their own, Local 189a; discrimination was arranged by the device of granting "jurisdiction" over the more attractive lines of progression and the more lucrative jobs to the white local.

In the circumstances of this case, the seniority and recall system which defendant unions and defendant Crown maintained in effect at the Crown, Bogalusa, Louisiana paper mill prior to February 1, 1968, perpetuates the consequences of past discrimination, and is unlawful under Title VII of the Civil Rights Act of 1964, and under Executive Order 11246 and the contractual clauses required thereby. Obviously, that seniority system was not a bona fide seniority system within the meaning of § 703(h) of Title VII. See *Quarles* v. *Philip Morris,* 279 F. Supp. 505 E.D. Va. 1968).

The government and plaintiff-intervenors have pressed on the Court the injustice of the "job seniority" system, its contribution to discrimination at Crown's Bogalusa plant, and the advantages of "mill seniority" over "job

seniority." Although we agree with the application of these arguments to the situation involved here, we think it important to correctly express the underlying basis of this approach. "Job seniority" is certainly not *inherently* prejudicial to Negroes; there is nothing about "job seniority" systems themselves to make them necessarily offensive; nor do we think "mill seniority" necessarily a better system. It is not the job seniority system in and of itself, but rather the continuous discrimination practiced by the defendants within the framework of that system, which now requires that the system be abolished in this case. Within the framework of a "job seniority" system, Negro employees have been forced into the inferior lines of progression and the less desirable jobs. The defendants claim that active discrimination against Negroes has now ceased. But the fact that Negroes who, under the present liberalized policy, have only recently entered formerly white progression lines are forced to compete with white employees for promotion on the basis of "job seniority" continues, in each case of such competition, the discriminatory effect of the long history of the relegation of those Negroes to other, less desirable lines.

We cannot accept the Union's contention that such discrimination is not prohibited by Title VII and that Title VII cannot be used in any way to alter or affect seniority systems. Where a seniority system has the effect of perpetrating discrimination, and concentrating or "telescoping" the effect of past years of discrimination against Negro employees into the *present* placement of Negroes in an inferior position for promotion and other purposes, that present result is prohibited, and a seniority system which operates to produce that present result must be replaced with another system. We agree wholeheartedly with the conclusion in *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968), that present discrimination cannot be justified under Title VII simply because Title VII refers to an effective date and because present dis-

crimination is caused by conditions in the past. "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Quarles, supra,* at 516.

We find that "mill seniority" is at least as good, if not better, than "job seniority" as the basis for regulating promotion, demotion and selection of employees for training. The contention that mill seniority does not allow full consideration of employee experience as one of the qualifications for promotion is, on its face, without merit, since the government seeks at this time only to supplant the test for promotion of employees to a vacant "job slot" from the job slots directly below the vacant slot in the same line of progression. In this situation, all employees competing for the vacant job will have had some previous experience in the progression line. Moreover, we by no means deny Crown the right to require that the competing employees have the fundamental qualifications necessary to fill the vacant position.

The Union asserts that the Court should stay its hand to give the white local a chance to bargain with Crown for a system which would produce a result fair to Negro employees. We cannot sympathize with this approach. This defendant Union bears some responsibility for the past discrimination and the present plight of the Negro employees under the "job seniority" system. The "mill seniority" system required by the Court would mitigate the harshness of this situation. The defendant Union does not seriously attack mill seniority as unfair, but principally questions the right of this Court to order any particular seniority system into effect.

As we have indicated, we do not hold that "mill seniority" is per se required under Title VII. But we do hold that, where, as here, "job seniority" operates to continue the effects of past discrimination, it must be replaced by some other, nondiscriminatory, system, and that mill se-

niority is an appropriate system in this case. We do not deny, by our present order, the right of Crown to urge some other equally acceptable system, if there be any, by which to control the flow of employee promotion and demotion, or the right of Local 189 to bargain for any such system. But we cannot permit the plaintiffs herein to remain without a remedy to present and continuing discrimination merely because the remedy called for involves matters which may be subject to the bargaining efforts of unions. Title VII provides for the correction of discriminatory practices by any remedial order which may be necessary; the scope of the remedy is not restricted to matters outside the jurisdiction of labor organizations. 42 U.S.C. § 2000e-6. Should an acceptable system other than "mill seniority" be proposed by any interested party, nothing herein would prohibit the Union from bargaining for it or Crown from implementing it, subject, of course, to the approval of the Court.

Because the defendant Union was unwilling to consent to a further extension of the Court's temporary restraining order pending a full-scale hearing of all issues in this case, only the two issues mentioned above were submitted to the Court at the hearing on March 20. All parties agreed to try the remaining issues before the Court on April 30, 1968. Because of the limited nature of the March 20 hearing, the basic relief required in view of the Court's findings with respect to the two issues submitted at that hearing may reasonably be expected to require some modification to accommodate whatever findings may be forthcoming after the more extensive hearing on April 30. The relief we grant by the present order we think adequately protects the plaintiffs with respect to the two limited issues which have been presented to us; but the relief granted should in no way operate to prejudice the outcome of the more extensive hearing to be held on the remaining issues so closely related to those already presented.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25956

LOCAL 189, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; and CROWN ZELLERBACH CORPORATION, *Appellants,*

v.

UNITED STATES OF AMERICA, by JOHN MITCHELL, Attorney General, *Appellee.*

Appeal from the United States District Court for the Eastern District of Louisiana

(July 28, 1969)

Before WISDOM and DYER, Circuit Judges, and KRENTZMAN, District Judge.

WISDOM, Circuit Judge: Title VII of the Civil Rights Act of 1964 prohibits discrimination in all aspects of employment.[1] In this case we deal with one of the most

[1] Pub. L. No. 88-352, 78 Stat. 241, 42 U.S.C. §§ 2000e to 2000e(15). For the legislative history, see Bureau of National Affairs, The Civil Rights Act of 1964; Vass, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431 (1966). Section 703(a) provides that:

"It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with re-

perplexing issues troubling the courts under Title VII:[2] how to reconcile equal employment opportunity *today* with seniority expectations based on *yesterday's* built-in racial discrimination. May an employer continue to award formerly "white jobs" on the basis of seniority attained in other formerly white jobs, or must the employer consider the employee's experience in formerly "Negro jobs" as an equivalent measure of seniority? We affirm the decision of the district court. We hold that Crown Zellerbach's job seniority system in effect at its Bogalusa Paper Mill prior to February 1, 1968, was unlawful because by carrying

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spect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[2] In the last two or three years there has been a burst of writing on Title VII and seniority rights. See, for example, Gould, Seniority and the Black Worker: Reflections on Quarles and its Implications, 47 Tex. L. Rev. ( ); Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969) (The authors are of counsel in the case before the court and in some of the other cases mentioned in this opinion); Jenkins, A Study of Federal Effort to End Job Bias: A History, A Status Report and a Prognosis, 14 How. L.J. 259 (1968); Gould, Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964, 13 How. L.J. 1 (1967); Walker, Title VII: Complaint and Enforcement Procedures and Relief and Remedies, 7 B.C. Ind. & Com. L. Rev. 495, 518 (1966); Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431 (1966); Note, Civil Rights-Racially Discriminatory Employment Practices under Title VII, 46 N.C.L. Rev. 891 (1968) (The note is on *Quarles*); Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260 (1967). (The court in *Quarles,* 279 F. Supp. 505, heavily relied on this note. In this case we too draw heavily on *Quarles* and the note.)

forward the effects of former discriminatory practices the system results in present and future discrimination. When a Negro applicant has the qualifications to handle a particular job, the Act requires that Negro seniority be equated with white seniority.

I.

A. The parties stipulated most of the basic facts. Crown Zellerbach (Crown) runs a paper mill at Bogalusa, Louisiana. The Company employs about 950 white workers and 250 Negro workers. Jobs there have always been organized hierarchically within "lines of progression". The jobs within each line for the most part are related functionally so that experience in one job serves as training for the next.

Until May 1964, the Company segregated the lines of progression by race, reserving some lines to white employees and others to Negroes. Local 189 of the United Papermakers and Paperworkers, the white local, had jurisdiction over the more desirable lines; Local 189-A, the Negro local, had jurisdiction over the left-overs. With very few exceptions, the lowliest white jobs paid more and carried greater responsibility than the most exalted Negro jobs. Promotion within each line was determined by "job seniority"; when a vacancy occurred, the workers in the slot below it could bid for the job, and the one who had worked the longest *in the job slot below* had priority.

The Company put new employees on "extra boards". These boards were labor pools used to fill temporary vacancies within the lines of progression. The senior men had first call on vacancies in the entry jobs at the bottom of the various lines. When lay-offs occurred, those at the bottom of the line were bumped back to the extra board. They had first claim, however, on any vacancies in their old jobs under "rights of recall". Crown segregated its extra boards, like its lines of progression, by race, one for Negroes and one for whites.

The Company merged the extra boards in May 1964. Whoever, regardless of race, had the longest term on the board now gained priority to bid on entry jobs in the white lines. Merger opened up the lines to Negro entrants, and helped the relatively recent Negro employees on the board. It did not help more senior Negroes already in the lines of progression. Moreover, the rights of recall gave any white who had served in a white line preference over others on the board in bidding on his old job. That fact slowed the advance of even newer Negro employees. A "transfer provision" added in 1965 enabled Negroes already in black lines of progression to bid on the bottom jobs in white lines on the basis of their "mill seniority", or time worked at the mill. This change meant that they did not have to become junior men on the extra board in order to bid on the starting job in previously white lines. It also meant that they did not have to surrender certain benefits accruing to mill seniority when they made the transfer.

Title VII went into effect with regard to Crown on July 2, 1965. Section 703 (a) (2) makes it unlawful for an employer

> "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (a) (2).

Later in 1965 the Equal Employment Opportunity Commission discussed with the Company and the Papermakers the effect of Title VII on seniority arrangements. A letter from Herman Edelsberg, the Executive Director of the EEOC, stated that the Commission would be satisfied by the "non-discriminatory application of the seniority agreement established by collective bargaining," i.e. job seniority, provided that Crown discontinue segregation of the

progression lines. The Chairman of the Commission, Franklin D. Roosevelt, Jr., met with representatives of the Company and the unions in December 1965 and declared that "application of the seniority system established by collective bargaining" would comply with the statute.

In January 1966 the unions and the Company amended the collective bargaining agreement so as to merge the progression lines within each department on the basis of existing pay rates. Except for one job in the plant, merger by pay rates merely meant tacking the Negro lines to the bottom of white lines. Whites on the extra boards who had rights of recall to jobs formerly entry jobs retained those rights to the same jobs, even though the positions were now in the middle of the merged lines. More importantly, Crown continued to award promotions according to job seniority: the man with the most years in the job slot below the vacancy had first call. Time worked in the mill counted for nothing as such. As a necessary result, Negroes had no seniority in bidding for formerly white jobs except as against each other and new white employees. They could not have such seniority, since the Company had not allowed them into the white progression lines. Crown gave no recognition to years spent in the Negro lines, and continued to make years spent in formerly white jobs the determinative factor in awarding all former white jobs except those previously at the entry level. The system conditioned job advancement upon a qualification that the Company itself had limited racially, *regardless of whether the qualification*—seniority in previously white jobs—*was necessary to do the work.* The legality of that arrangement is the main issue here.

In February 1967, more than a year after the merger of the lines, the Office of Federal Contract Compliance entered the picture. That agency has responsibility for overseeing compliance with Executive Order 11246 requiring non-discrimination assurances from all employers who

contract with the federal government.[3] The OFCC attacked what the EEOC had previously seemed to approve, Crown Zellerbach's system of job seniority. In place of job seniority the OFCC proposed an "A + B" system which would combine an employee's time in the job below the vacancy and his total time at the mill in computing seniority. The Company accepted this compromise and tried to get the Papermakers to go along with it. The two locals, 189 and 189-A, both refused, although for different reasons. Crown thus faced a strike if it went ahead with the "A + B" system and the loss of future federal contracts if it did not.[4] In January it notified the unions that it would install the "A + B" system unilaterally on February 1, 1968. Local 189, the white union, responded by voting to strike on that date. Local 189-A, the Negro union, refused to join in the strike warning, calling the "A + B" system "a step in the right direction".

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[3] Section 202 of the order in part reads as follows:

". . . During the performance of this contract, the contractor agrees as follows: '(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause." (3 C.F.R. 1965 Supp. pp. 168.)

[4] Crown obtained an injunction from a district court in December restraining the Secretary of Labor from barring the company from federal contracts without a prior hearing. Crown Zellerbach v. Wirtz, D.D.C. 1968, 281 F. Supp. 337.

The Government filed this suit on January 30, 1968, to enjoin the strike as an effort "to perpetuate a seniority and recall system which discriminates against Negro employees". The district court granted the injunction the next day. The United States then asked the court to strike down the "A + B" system as illegal, and to require that mill experience alone become the standard of seniority. The Government now was asking the court to set aside job seniority in any form, a stronger measure than the one requested earlier by the OFCC, which in turn had gone beyond the original position of the EEOC.[5] Local 189-A and two Negro employees intervened as plaintiffs on behalf of all Negro employees at the mill.

After a three-day hearing on job seniority, the district court issued an order on March 26, 1968, dealing with two issues that had been stipulated by the parties as severable from the eleven others in the case. The court continued in effect the injunction of January 31. It also held that job seniority "presently discriminate[s] against Negro employees at the mill whenever Negroes hired prior to January 1965 [when progression lines were merged] compete against white employees for promotion, demotion or selection for training". The court also found that job seniority, as a matter of fact, "is not necessitated by safety or efficiency factors . . ." It ordered the abolition of job seniority in favor of mill seniority "in all circumstances in which one or more competing employees is a Negro employee hired prior to January 16, 1966." The decree did not, by its terms, upset the use of job seniority in bidding that involved only whites or Negroes hired after the merger of the lines of progression.

In explaining its order, the court pointed out that the abolition of job seniority did not mean that affected Negro employees would be able to bid on any job in the mill

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[5] See Section VI of this opinion.

solely on the basis of their years with the Company. They would still have to move up the lines of progression job-by-job. Among the competitors within the slot below a vacancy, however, time in the mill rather than time in the job would define seniority. As a further qualification of its order, the court disavowed any intention "to deny Crown the right to require that competing employees have the fundamental qualifications necessary to fill the vacant position."

A month after issuing its order, the district court heard testimony and argument on the remaining eleven issues stipulated as severable from the issue of job seniority. The court disposed of one issue by ordering the merger of Local 189 and Local 189-A. The court decided the remaining ten issues on June 26, 1969.[6]

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[6] On June 26, 1969 the district court issued its findings of fact and conclusions of law on the remaining issues. (1) The court found that Crown had continued to discriminate in job assignments by appointing whites to traditionally white jobs and Negroes to traditionally Negro jobs. The court added to the aggrieved class Negroes hired since the merger of the progression lines (1966), except for the six Negroes hired since then "who in fact bid for and received formerly white jobs from the Extra Board". (2) The court concluded that a six-months residency requirement was not necessary to train employees for the next higher job in every instance. The parties, it noted, had stipulated which residency requirements were justified by need. (3) The court also found that certain jobs provide no training for the next higher levels. It therefore held that Negroes within the aggrieved class could skip those jobs in bidding on higher jobs in the merged lines of progression. (4) Finally, the court found that 64 hours of temporary assignment to a job per month provided training equivalent to permanent assignment to the job and should be treated as such for the purposes of bidding. The disposition of these and other issues in the district court's decision of June 26 does not affect our consideration of its earlier findings of fact and conclusions of law.

B. The stipulated issues are: "whether, under the facts and circumstances of this case, the job seniority system which was in effect at the Bogalusa paper mill prior to February 1, 1968, was unlawful" and, if so, "what is the necessary or appropriate standard or guideline for identifying the seniority of employees for purposes of promotion or demotion?"

The plaintiffs maintain that Crown's practice of awarding jobs on the basis of *job* seniority rather than *mill* seniority discriminates against Negroes, since they had no way of attaining job seniority in "white" slots until the recent desegregation of the plant. When Negroes bid for jobs above the former entry level of white lines of progression, Crown in effect penalized them for not having what it denied them on account of their race until a short time ago—"white" job seniority. Crown's system gives renewed effect to the old racial distinctions without the plaintiffs say, *the justification of business necessity.* The practice of awarding jobs by job seniority would, the plaintiffs assert, amount to present and prospective racial discrimination.

Crown and Local 189, the white union, maintain that Crown ceased to discriminate in 1966 when it merged the white and Negro lines of progression. That change, coupled with the merger of the extra boards in 1964 and the transfer provisions of 1965 removed all explicit racial classification at the Bogalusa mill. What remains, the defendants say, is a racially neutral system of job seniority. The fact that the system continues to prefer whites over previously hired Negroes in filling certain vacancies does not in itself show racial discrimination. That effect, the defendants argue, is merely an ineradicable consequence of extinct racial discrimination. They point to evidence that Congress meant Title VII to apply prospectively only. Competitive seniority has an honorable place in the history

of labor,[7] and portions of the legislative history of the Act seem to immunize accrued rights of seniority against remedial measures. Thus Title VII § 703(h) specifically protects "bona fide seniority systems" from the operation of the Act. The defendants also maintain that insistence upon mill seniority would effectively bestow preferential treatment upon one race, which the Act by its terms positively forbids.

I.

No one can quarrel with the broad proposition that Title VII operates only prospectively. By specific provision, the Act did not become effective at all until one year after the date of enactment. The central operative provision, § 703 (a), declares that "it *shall* be an unlawful employment practice" for an employer to discriminate. (Emphasis added.) Section 701 (b) and (e) provide that for staggered effective dates: The Act applied on July 2, 1965, only to employers of 100 employees or more, extend-

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[7] Cooper and Sobol, fn. 2: "The use of competitive status seniority to govern promotions, demotions, and layoffs is a fundamental aspect of industrial relations in this country. In nearly all businesses of significant size whose employees are organized, a seniority system plays some role in determining the allocation of the work. Such systems are commonly accompanied by lines of progression or promotional ladders which establish an order of jobs through which employees normally are promoted.

Seniority may be measured by total length of employment with the employer ("employment," "mill," or "plant" seniority), length of service in a department, ("departmental seniority"), length of service in a line of progression ("progression line" seniority), or length of service in a job ("job" seniority). Different measures of seniority sometimes are used in the same plant for different purposes. The variations and combinations of seniority principles are very great, but in all cases the basic measure is length of service, with preference accorded to the senior worker. Similarly, construction craft unions, which control the allocation of local work in their craft, have adopted referral rules based on length of service."

ing to employers of 75, 50, and 25 at successive yearly intervals. The dispute is whether a seniority system based on pre-Act work credit constitutes present discrimination.

Although the effect of Title VII provoked considerable debate in Congress, the legislative history of the title is singularly uninstructive on seniority rights. Opponents of the Act warned that Title VII would destroy hard-earned seniority rights; proponents responded that it would not affect accrued seniority.[8] In *Quarles* v. *Phillip Morris, Inc.*, E.D. Va. 1968, 279 F. Supp. 505, after a careful review of the legislative history, Judge John D. Butzner, Jr. concluded:

> Several facts are evident from the legislative history. First, it contains no express statement about depart-

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[8] "Title VII would have no effect on seniority rights existing at the time it takes effect" Justice Department statement, Cong. Record, April 8, 1964, p. 6986. "If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as a basis for a discharge subsequent to the effective date of the title . . . but, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by taking effect of Title VII. Employer and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." Ibid. "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the Title comes into effect, the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." Memorandum by Senators Clark and Case. Bureau of National Affairs Operations Manual, The Civil Rights Act of 1964, p. 320. See Cooper and Sobol, fn. 2, 1607-1614.

> mental seniority. Nearly all of the references are clearly to employment seniority. None of the excerpts upon which the company and the union rely suggests that as a result of past discrimination a Negro is to have employment opportunities inferior to those of a white person who has less employment seniority. Second, the legislative history indicates that a discriminatory seniority system established before the act cannot be held lawful under the act. The history leads the court to conclude that Congress did not intend to require "reverse discrimination"; that is, the act does not require that Negroes be preferred over white employees who possess employment seniority. It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act.

Perhaps the strongest argument for the *Quarles* construction of the Act is § 703(h):

> Section 703(h) expressly states the seniority system must be *bona fide*. The purpose of the act is to eliminate racial discrimination in covered employment. Obviously one characteristic of a *bona fide* seniority system must be lack of discrimination. Nothing in § 703(h), or in its legislative history suggests that a racially discriminatory seniority system established before the act is a *bona fide* seniority system under the act. Quarles v. Philip Morris, Incorporated, E.D. Va., 1968, 279 F. Supp. 505, 517.

We agree with this view.

II.

The defendants assert, paradoxically, that even though the system conditions future employment opportunities upon a previously determined racial status the system is

itself racially neutral and not in violation of Title VII. The translation of racial status to job-seniority status cannot obscure the hard, cold fact that Negroes at Crown's mill will lose promotions which, *but for* their race, they would surely have won. Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias. It is not decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the *past* is to cut into the employees *present* right not to be discriminated against on the ground of race. The crux of the problem is how far the employer must go to undo the effects of past discrimination. A complete purge of the "but-for" effects of previous bias would require that Negroes displace white incumbents who hold jobs that, but for discrimination, the Negroes' greater mill seniority would entitle them to hold. Under this *"freedom now"* theory,[9] allowing junior whites to continue in their jobs constitutes an act of discrimination.

Crown and Local 189 advance a *"status quo"* theory: the employer may satisfy the requirements of the Act merely by ending explicit racial discrimination.[10] Under that theory, whatever unfortunate effects there might be in future bidding by Negroes luckless enough to have been hired before desegregation would be considered merely as an incident of now extinguished discrimination.

A *"rightful place"* theory[11] stands between a complete purge of "but-for" effects and maintenance of the status quo. The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system

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[9] See Note, Harv. L. Rev., fn. 2, 1268.

[10] Id.

[11] Id.

that "locks in" prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation.

Not all "but-for" consequences of pre-Act racial classification warrant relief under Title VII. For example, unquestionably Negroes, as a class, educated at all-Negro schools in certain communities have been denied skills available to their white contemporaries. That fact would not, however, prevent employers from requiring that applicants for secretarial positions know how to type, even though this requirement might prevent Negroes from becoming secretaries.

This Court recently struck down a nepotism membership requirement of a "white" union which shortly before had ceased overt discrimination. *Local 53* v. *Vogler,* 5 Cir. 1969, 407 F.2d 1047. Under the nepotism rule, only the sons of members or close relatives living with members could become "improvers", and only "improvers" could be accepted into the union. Relationship to a member as a prerequisite to admission had the necessary effect of locking non-whites out of the union. The union argued that the desire to provide family security was a rational non-racial basis for the rule and that since the nepotism requirement excluded all persons unrelated to members, regardless of their race, it could not, therefore, be called a racial classification. This court held that the rule served no purpose related to ability to perform the work in the asbestos trade and that it violated Title VII:

> The District Court did no more than prevent *future* discrimination when it prohibited a continuing exclusion of negroes through the application of an apparently neutral membership provision which was *originally* instituted at least in part because of racial discrimina-

> tion and which served no significant trade-related purpose. While the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to negroes and Mexican-Americans any real opportunity for membership.

In *Vogler* this Court made the point, citing *Quarles*, that "where necessary to insure compliance with the Act, the District Court was fully empowered to eliminate the present effects of past discrimination". *Vogler*, however, does not mesh completely with the facts in this case. The nepotism rule there, as the court pointed out, had scant relation to the operation of the business. It also had the inevitable effect of assuring the lily-white status of the union for all time. Nevertheless, the decision does support the position that reliance on a standard, neutral on its face, is no defense under the Act when the effect of the standard is to lock the victims of racial prejudice into an inferior position.

The controlling difference between the hypothetical typing requirement and the nepotism rule rejected in *Vogler* is *business necessity*. When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, nonracial business purpose. Secretaries must be able to type. There is no way around that necessity. A nepotism rule, on the other hand, while not unrelated to the training of craftsmen,[12] is not essential to that end. To be sure, skilled workers may gain substantial benefits from having grown up in the home of a member of the trade. It is clear, nonetheless, that the benefits secured by nepotism must give way

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[12] See Kotch v. River Port Pilot Commrs., 1947, 330 U.S. 552, 67 S. Ct. 910, 91 L. Ed. 1093.

because of its effective continuation and renewal of racial exclusion. That much was decided in *Vogler*.

The decisive question then is whether the job seniority standard, as it is now functioning at the Bogalusa plant, is so necessary to Crown Zellerbach's operations as to justify locking Negroes, hired before 1966, into permanent inferiority in their terms and conditions of employment. The record supports the district court's holding that job seniority is not essential to the safe and efficient operation of Crown's mill. The defendants' chief expert witness, Dr. Northrup, made it clear that he considered mill seniority "disastrous" only to the extent that it allowed *all* men in a slot to bid on the basis of their time at the mill. He stated that mill seniority in that sense would create labor unrest because its main effect would be to allow whites to "jump" other whites and Negroes to "jump" other Negroes. He also expressed fears about allowing anyone to bid on any vacancy in a line of progression, without requiring that he first advance job-by-job through the various levels below it. That problem might be solved, he stated, by imposing a residency requirement for training purposes. Dr. Northrup explicitly stated that job seniority does *not* provide the only safe or efficient system for governing promotions. He suggested, in fact, an alternative "job credit" system that would give certain fractional seniority credit to victims of discrimination for the years in which they had been excluded from the white progression lines.

The court took account of Dr. Northrup's apprehensions in fashioning its decree. In place of job security the court ordered the institution of a mill seniority system carefully tailored to assure that no employee would have a right to a job that he could not perform properly. The court's decision put the emphasis where it belongs: absent a showing that the worker has the ability to handle a particular job, the entry job is the proper beginning for any worker. Under the court's decree, employees still must move up through

the various lines of progression job-by-job.[13] As a further restraint, if a certain minimum time is needed in one job to train an employee for the next, a residency requirement may be imposed that will slow the rise of Negro employees. Under the system that is in effect at the mill now, and that is unaffected by the decree, that residency period is six months. To meet the problem of labor unrest that might result from "jumping" unrelated to racial issues, the court specifically limited its decree to instances in which Negroes hired before 1966 were among the bidders. Finally, and most importantly, both the court's decree and the existing collective bargaining agreement give Crown Zellerbach the right to deny promotions to employees who lack the ability or qualification to do the job properly.

All these precautions, we think, bear out the plaintiffs' assertion that there are satisfactory alternatives to job seniority at the Bogalusa mill. They lead us to conclude that the imposition of a system that prepetuates and renews the effects of racial discrimination in the guise of job seniority is not necessary or justified at Bogalusa. Job seniority, embodying as it does, the racially determined effects of a biased past, constitutes a form of present racial discrimination.

This case is not the first case to present to courts in this circuit the problem of dealing with a change in system that is apparently fair on its face but in fact freezes into the system advantages to whites and disadvantages to Negroes. In *United States* v. *State of Louisiana*, E.D.La. 1963, 225 F. Supp. 353, a three-judge court had before it a new citizenship test adopted by the State Board of [Voters] Registration. The test was fair on its face and, perhaps, capable of fair administration. But it was a test that white voters, almost all of whom were registered, had not had to take. It was a difficult test for eligible Negroes, most of whom were not registered. The court enjoined the State from

[13] See footnote 6.

administering the test. "The promise of evenhanded justice in the future does not bind our hands in undoing past injustices". 225 F. Supp. at 396. The court said:

> The cessation of prior discriminatory practices cannot justify the imposition of new and onerous requirements, theoretically applicable to all, but practically affecting primarily those who bore the brunt of previous discrimination. An appropriate remedy therefore should undo the results of past discrimination as well as prevent future inequality of treatment. A court of equity is not powerless to eradicate the effects of former discrimination. If it were, the State could seal into permanent existence the injustices of the past.

The Supreme Court affirmed, adding: "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 1965, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709. See also *Meredith* v. *Fair,* 5 Cir. 1962, 298 F.2d 696, 702, cert. denied; *United States* v. *Dogan,* 5 Cir. 1963, 314 F.2d 767; *United States* v. *Atkins,* 5 Cir. 1963, 323 F.2d 733; *United States* v. *Penton,* M.D.Ala. 1962, 212 F. Supp. 193. *Cf. Guinn* v. *United States,* 1915, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340; *Lane* v. *Wilson,* 1939, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281; *Goss* v. *Board of Education,* 1963, 373 U.S. 683, 688, 83 S.Ct. 1405, 1409, 10 L.Ed.2d 632, 636.

It might be said that in these cases the courts focused on the unlawfulness of the prior discrimination. In *Gaston County* v. *United States,* 1969, 39 U.S. 285, 89 S.Ct. , 23 L.Ed.2d 309, however, the Court's refusal to approve a voter literacy test was based on the inferior education inherent in segregated schooling. The automatic "triggering" provisions of the 1965 Voting Rights Act of 1965 had suspended Gaston County's literacy test because certain indicia chosen by Congress raised the presumption that the

tests were being used to discriminate against Negroes seeking to register. In order to reinstate its test under the Act, Gaston County had to show that it had not used the test in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." The district court found, as a fact, that Gaston County's Negro schools had not provided educational opportunities equal to those available to whites. That alone, said the Supreme Court, would make the imposition of a literacy test an act of continuing discrimination. Neither the fair administration of the test, nor its legitimate public purpose could save it from condemnation under the Act.

III.

With specific regard to employment opportunities under Title VII, decisions by at least two district courts support our conclusion that facially neutral but needlessly restrictive tests may not be imposed where they perpetuate the effects of previous racial discrimination.

In *Quarles* v. *Philip Morris, Inc.*, E.D. Va. 1968, 279 F. Supp. 505, the first case to challenge the legality of a promotion system under Title VII, the employer had segregated the races by departments at its plant. The employer desegregated the plant but prohibited transfers from one department to another. It also required that the transferor bid on vacancies according to his departmental seniority, rather than his seniority at the plant. The effect was to deny to Negroes promotion into the better paying jobs, because they could not accumulate seniority in the fabrication and warehouse departments, where the better jobs lay. Quarles, a Negro employed in the prefabrication department, could not become a truck driver, a higher-rung position in an all-white department. The court held that the new arrangement violates the statute (279 F.Supp. at 519):

> "The present discrimination resulting from historically segregated departments is apparent from con-

> sideration of the situation of a Negro who has worked for ten years in the prefabrication department. . . . [He is required] to sacrifice his employment seniority and take new departmental seniority based on his transfer date. Thus a Negro with ten years employment seniority transferring . . . from the prefabrication department to the fabrication department takes an entry level position with departmental seniority lower than a white employee with years less employment seniority. These restrictions upon the present opportunities for Negroes result from the racial pattern of the company's employment practices prior to January 1, 1966. The restrictions do not result from lack of merit or qualification. A transferee under any plan must satisfy ability and merit requirements regardless of his seniority . . .
>
> The court finds that the defendants have intentionally engaged in unlawful employment practices by discriminating on the ground of race against Quarles, and other Negroes similarly situated. This discrimination, embedded in seniority and transfer provisions of collective bargaining agreements, adversely affects the conditions of employment and opportunities for advancement of the class."

In *Dobbins* v. *Local 212, IBEW*, S.D. Ohio 1968, 292 F. Supp. 413, the union had formerly excluded nonwhites from membership. The effects of this practice had been doubly serious, since the union controlled hiring referrals within a certain geographic area. After opening its apprenticeship programs and membership to Negroes the union continued to prefer applicants who had previously worked under union contracts. This preferential referral system contained no explicit racial classification or discriminatory purpose. The court looked, nonetheless, to its inevitable discriminatory effect:

> "A policy of giving priority in work referral to persons who have experience under the Local's Collective

> Bargaining Agreement is discriminatory when competent N[egroe]s have previously been denied the opportunity to work under the referral agreement by reason of their race." 292 F. Supp. at 445.

When the defendant's conduct evidences an "economic purpose" there is no discrimination under Title VII: "The limitation of either union or apprenticeship membership to a number far below the number necessary for the particular trade would be a discriminatory practice and pattern in context involving an all ["W]hite union membership with a previous history of discrimination. *Louisiana* v. *United States*, 1965, 380 U.S. 145. However, on a showing by a defendant that the limitation has nothing to do with any discriminatory intention but is related to reasonable economic purpose, the limitation in number is not unlawful." The court went on to hold the referral system illegal:

> "Preference to union members in work referral is a violation of Title VII if that preference operates after July, 1965, to continue to restrict the employment opportunities of N's who have been excluded from membership and work under union auspices because of their race. United States by Clark v. Local 189, United Papermakers and Paperworkers, 282 F. Supp. 39 (D.C. La., 1968); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (D.C. Va., 1968)." 292 F. Supp. at 446.

Nothing that we said in *Whitfield* v. *United Steelworkers, Local 2708*, 5 Cir. 1958, 263 F.2d 546, cert. denied 360 U.S. 902, compels a different result. In that case Negro workers challenged a plan, negotiated through collective bargaining, purporting to do away with segregated lines of progression in a steel mill. There was no issue in *Whitfield* as to the measure of promotion from one job to another. *Quarles* distinguishes *Whitfield* (279 F. Supp. at 518):

> *Whitfield* does not stand for the proposition that present discrimination can be justified simply because it

was caused by conditions in the past. Present discrimination was allowed in *Whitfield* only because it was rooted in the Negro employees' lack of ability and training to take skilled jobs on the same basis as white employees. The fact that white employees received their skill and training in a discriminatory progression line denied to the Negroes did not outweigh the fact that the Negroes were unskilled and untrained. Business necessity, not racial discrimination, dictated the limited transfer privileges under the contract.

In *Whitfield* the company had organized functionally-related jobs into two separate lines of progression, Line 1 (the skilled jobs) for whites and Line 2 (the unskilled jobs) for Negroes. Advancement in a line was based on knowledge and experience acquired in the next lower job. The company opened both lines on a non-racial basis, and added that Negroes in Line 2 would in the future have preference over new whites in applying for vacancies in Line 1. Except for variations in pay, the change had the effect of merging the lines into one, with the formerly white line on top. In *Whitfield*, unlike the present case, the two lines were not so functionally related that experience at the top of the formerly black line could provide adequate training for the bottom jobs in the white line. The company therefore required that men moving into the formerly all-white Line 1 take a qualification test, one that the white incumbents had not been required to take. (The company had previously required 260 hours "probationary" experience instead.) Negroes objected to the test requirement on the ground that whites already working in Line 1 did not have to take the test to advance or remain in the line. The company also required, as we have said, that employees bidding into Line 1 from Line 2 start at the bottom job. Negroes in Line 2 protested that this requirement also discriminated against them because it meant that Negroes would have to take a wage cut in moving from the top job in Line 2 to the

bottom job in Line 1. The plaintiffs brought the complaint under the *Steele* doctrine,[14] which requires certified unions to represent members of the bargaining unit on a non-discriminatory basis.

This Court rejected both of the plaintiffs' objections. We held that the qualification test was the "'minimum assurance' the Company could have of efficient operations", and that the company and union had gone "about as far as they could go in giving negroes preference in filling Number 1 line vacancies consistent with being *fair to incumbents and consistent with efficient management.*" 263 F. 2d at 550 (emphasis added.) The requirement that entrants into Line 1 start at the bottom job was justified as a business necessity:

> *Such a system was conceived out of business necessity,* not out of racial discrimination. An employee without proper training and with no proof of potential ability to rise higher, cannot expect to start in the middle of the ladder, regardless of plant seniority. It would be unfair to the skilled, experienced, deserving employee to give a top or middle job to an unqualified employee. It would also destroy the whole system of lines of progression *to the detriment of efficient management* and to the disadvantage of negro as well as white employees having a stake in orderly promotion." 263 F.2d at 550.

In *United States* v. *H. K. Porter Co.*, N.D. Ala. 1968, 296 F. Supp. 40, 90, the court rejected an attack by the Government upon "the procedure that the first man to get a job is the first man to 'advance'", *i.e.* job seniority, super-imposed, as here, upon a history of racial discrimination. The

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[14] See Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173, and Syres v. Oil Workers International Union, Local 23, 1955, 350 U.S. 892, 76 S. Ct. 152, 100 L. Ed. 785.

court found, as a matter of fact, that it was not "permissible" to assume "on the record in this case" that

> "with less than the amount of one-the-job training now acquired by reason of the progression procedure, employees could move into jobs in the progression lines and perform those jobs satisfactorily and—more importantly—without danger of physical injury to themselves and their fellow employees." 290 F. Supp. at 91.

In other words, the record in that case, as the district court viewed it, showed that safety and efficiency, the component factors of business necessity, would not allow relaxation of the job seniority system. We see no necessary conflict between *Porter's* holding on this point and our holding in the present case.

We have also considered two district court decisions cited by the defendants, *United States* v. *Sheet Metal Workers,* E.D. Mo. 1968, 280 F. Supp. 719, and *Griggs* v. *Duke Power Co.,* M.D. N. C. 1968, 292 F.2d 243. In *Sheet Metal Workers,* the defendant white unions had adopted a referral system giving priority to men with previous referrals. They had also discriminated racially before the effective date of the Act as had the union in Dobbins. On the other hand, they had adopted positive measures to encourage minority-group membership. The district court could find no person who had actually suffered on account of his race under the referral preference system and no "pattern or practice" of discrimination. (The sole plaintiff was the United States.) On the contrary, it found that "in every instance, qualified Negroes applying for union membership and/or apprenticeship training since July 2, 1965, have been admitted therein." 280 F. Supp. 729. Among union members, of course, the referral preference system might well have had the effect of favoring whites, since they would have had a greater chance to amass time under the collective bargaining agreement. On the other hand,

if there was more than enough work to go around, the discriminatory tendency inherent in the referral rule might not have asserted itself. The opinion is silent on that critical fact, noting only that "the record is devoid of any specific instance of discrimination". 280 F. Supp. 730.

In *Griggs* the defendant employer had in the past limited Negroes to jobs in the labor department, excluding them from better work in other departments. The plaintiffs sought to overturn a requirement of ten years standing that any employee transferring into one of the formerly white departments have a high school education or passing marks on a qualification test. The court found that both the tests and the education requirements were not racially motivated, but were part of the company's effort to upgrade its work force. It took note of a specific provision in Title VII, § 703(h), that exempts from the operation of the Act the use of "any professionally developed ability test . . . not designed . . . to discriminate because of race" and went on to strike down an EEOC interpretation of that provision which would limit the exemption to tests that measure ability "*required* by the *particular job* or class of jobs which the applicant seeks". (Emphasis added.) The court concluded that the defendant had not violated the Act, since it had not discriminated after July 2, 1965.

When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes on-going discrimination, unless the incidents are limited to those that safety and efficiency require. That appears to be the premise for the Commission's interpretation of § 703(h). To the extent that *Griggs* departs from that view, we find it unpersuasive.

IV.

The defendants maintain that Congress specifically exempts seniority system such as Crown's from the operation of Title VII. In support of their assertion the defend-

ants cite that portion of § 703(h) which allows an employer to "apply different standards of compensation, or different terms, conditions, or privileges of employment *pursuant to a bona fide seniority* or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin".

No doubt, Congress, to prevent "reverse discrimination" meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination. As the court pointed out in *Quarles,* the treatment of "job" or "department seniority" raises problems different from those discussed in the Senate debates: "a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system." 297 F. Supp. at 554.

It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust

of the Senate debate is directed against such preferential treatment on the basis of race. That sentiment was codified in an important portion of Title VII, § 703(j):

> "(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U.S.C. § 2000e-2(j).

No stigma of preference attaches to recognition of time actually worked in Negro jobs as the equal of white time. The individual victims of prior discrimination in this case would necessarily be the ones—the only ones—to benefit by the institution of mill seniority, as modified in the decree. We conclude, in agreement with *Quarles,* that Congress exempted from the anti-discrimination requirements only those seniority rights that gave white workers preference over junior Negroes. This is not to say that *Whitfield* and *Quarles* and Title VII prohibit an employer from giving compensatory training and help to the Negro workers who have been discriminated against. Title VII's imposition of an affirmative duty on employers to undo past discrimi-

nation permits compensatory action for those who have suffered from prior discrimination.

V.

We find unpersuasive the argument that, whatever its operational effects, job seniority is immune under the statute because not imposed with the *intent* to discriminate. Section 703(h), quoted earlier, excludes from the strictures of Title VII different working terms dictated by "bona fide" seniority systems "provided that such differences are *not the result of an intention to discriminate because of race* . . ."[15] Here, however, if Crown did not intend to

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[15] "In determining the meaning of 'intentional,' resort must be had almost entirely to legislative history. In its original form, 706(g) contained no such requirement; it was amended by Senator Dirksen's proposal, probably in response to opposition pressure. The first draft of the amendment contained the word 'willfully' instead of 'intentionally'; interpretative material was introduced into the record by Senator Dirksen:

> The words 'willful and willfully' as ordinarily employed, mean nothing more than that the person, of whose actions or default the expressions are used, knows what he is doing, intends what he is doing, and is a free agent . . .
>
> The terms are also employed to denote an intentional act . . . as distinguished from an accidental act . . .
>
> This is precisely the situation which might exist if the words are not added . . . Accidental, inadvertent, heedless, unintended acts could subject an employer to charges under the present language.

For reasons that are not apparent, this version was not enacted, and not until some time later was the amendment with the present language passed. The only significant difference between the two versions is the substitution of 'intentionally' for 'willfully' and there is no indication that any strengthening of the requirement was meant. It may be concluded that the Dirksen Amendment does not greatly narrow the coverage of section 706(g)." Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Col. L. Rev. 691, 713 (1968).

punish Negroes as such by reinstituting job seniority, the differences between the job status of Negroes hired before 1966 and whites hired at the same time would have to be called the "result" of Crown's earlier, intentional discrimination. *Quarles* put it this way:

> "The differences between the terms and conditions of employment for white [sic] and Negroes about which plaintiffs complain are the result of an intention to discriminate in hiring policies on the basis of race before January 1, 1966. The differences that originated before the act are maintained now. The act does not condone present differences that are the result of intention to discriminate before the effective date of the act, although such a provision could have been included in the act had Congress so intended. The court holds that the present differences in departmental seniority of Negroes and white [sic] that result from the company's intentional, racially discriminatory hiring policy before January 1, 1966 are not validated by the *proviso* of § 703(h)" 279 F.Supp. 517-518.

Section 706(g) limits injunctive (as opposed to declaratory) relief to cases in which the employer or union has "*intentionally engaged in*" an unlawful employment practice. Again, the statute, read literally requires only that the defendant meant to do what he did, that is, his employment practice was not accidental. The relevant legislative history, quoted in the margin, bears out the language of the statute on that point.

Section 707(a) allows the Attorney General to enforce the Act only where there is a "pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter" and where the pattern or practice "is *intended* to deny the full exercise of the rights herein described". Defendants contend that no such condition ex-

isted here. The same point arose in *Dobbins*. The court rejected it (297 F. Supp. at 448):

> "In reviewing statutes, rules or conduct which result in the effective denial of equal rights to Negroes or other minority groups, intention can be inferred from the operation and effect of the statute or rule or from the conduct itself. The conduct of defendant in the present case 'by its very nature' contains the implications of the required intent. Local 357, Intern. Broth. of Teamsters, etc. v. National Labor Relations Board, 365 U.S. 667 at 675, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961) citing Radio Officers' Union, etc. v. National Labor Relations Board, 347 U.S. 17, 45, 74 S.Ct. 323, 98 L.Ed. 455 (1954). See also the remarks of then Senator Humphrey, 110 Cong. Rec. 14270 in reference to Title VII, 'Intention could, be proved by or inferred from words, conduct or both.' Thus the Attorney General has a cause of action when the conduct of a labor organization in relation to N's or other minority groups has the effect of creating and preserving employment opportunities for W's only. Section 707(a) of the Civil Rights Act of 1964."

Here, as in *Dobbins*, the conduct engaged in had racially-determined effects. The requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them. Section 707(a) demands no more.

VI.

The defendants contend that the letters and statements made by EEOC officials approving the merger of Crown's progression lines acted as a bar under § 713(b) of the Act to suit by either the Government or by the private plaintiffs Johnson, Hill, and Local 189-A. The relevant portion of § 713(b) reads as follows: "In any action or proceeding based on any alleged unlawful employment practice, no

person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission".

The key phrase in this provision is "written opinion or interpretation of the Commission". The EEOC published its own interpretation of the phrase in the Federal Register in June 1965, *before Title VII took effect and some six months before the public statements at issue here:* "Only (a) a letter entitled 'opinion letter' and signed by the General Counsel on behalf of the Commission or (b) matter published and so designated in the Federal Register may be considered a 'written interpretation or opinion of the Commission' within the meaning of section 713 of Title VII." 29 C.F.R. § 1601.30.

The statements that Crown relied upon to its supposed detriment in this case do not fall within either of the defined categories. They appeared neither as portions of the Federal Register or as designated "opinion letters" over the signature of the General Counsel. We have merely a letter from Mr. Edelsberg, Executive Director, and a statement of Mr. Roosevelt, the Chairman of the Commission. Mr. Edelsberg was not General Counsel, nor did his letter bear the "opinion letter" label. Mr. Roosevelt issued his statement orally. The regulation clearly requires more.

Courts give great weight to an agency's interpretation of the statute that it administers.[16] The regulation here gives reasonable scope to the statutory provision. A broader reading might bind the Commission to informal or unapproved opinions volunteered by members of its staff.

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[16] Zemel v. Rusk, 1965, 380 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179; Udall v. Tallman, 1965, 381 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616; Oower Reactor Development Corp. v. Int. U. of Elec., 1960, 367 U.S. 396, 81 S. Ct. 529, 6 L. Ed. 2d 924.

We cannot help sharing Crown Zellerbach's bewilderment at the twists and turns indulged in by government agencies in this case. We feel compelled to hold, however, that neither the statement by Chairman Roosevelt nor the letter by Executive Director Edelsberg provides a legal defense to the present suit.

VII.

Our main conclusions may be summarized as follows: (1) Crown's job seniority system carries forward the discriminatory effects integral to the company's former employment practices. (2) The safe and efficient operation of the Bogalusa mill does not depend upon maintenance of the job seniority system. (3) To the extent that Crown and the white union insisted upon carrying forward exclusion of a racially-determined class, *without business necessity,* they committed, with the requisite intent, in the statutory sense, an unfair employment practice as defined by Title VII.

The district court thoughtfully worked a decree studded with provisos to protect the employer from the imposition of unsafe or inefficient practices and at the same time prevent racial discrimination. The decree also specifically provides that job seniority may still apply to bidding between one white employee and other. By making the decree applicable only to bidding that involves Negroes hired before 1966, the district court limited the remedy to the scope of the illegal conduct. The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1968

No. 25956

D. C. Docket No. CA 68-205

LOCAL 189, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; and CROWN ZELLERBACH CORPORATION, *Appellants,*

v.

UNITED STATES OF AMERICA, by JOHN MITCHELL, Attorney General, *Appellee.*

Appeal from the United States District Court for the Eastern District of Louisiana

Before WISDOM and DYER, Circuit Judges, and KRENTZMAN, District Judge

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that appellants pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 28, 1969

Issued as Mandate: Oct. 17, 1969.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25956

LOCAL 189, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; and CROWN ZELLERBACH CORPORATION, *Appellants,*

v.

UNITED STATES OF AMERICA, by JOHN MITCHELL, Attorney General, *Appellee.*

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(October 1, 1969)

Before WISDOM and DYER, Circuit Judges, and KRENTZMAN, District Judge

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX E

[3 C.F.R. 339 (1964-65 comp.)]

EXECUTIVE ORDER 11246

EQUAL EMPLOYMENT OPPORTUNITY

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit, discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

SEC. 102. The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101.

SEC. 103. The Civil Service Commission shall supervise and provide leadership and guidance in the conduct of equal employment opportunity programs for the civilian employees of and applications for employment within the executive departments and agencies and shall review agency program accomplishments periodically. In order to facilitate the achievement of a model program for equal employment in the Federal service, the Commission may consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Part.

SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, creed, color, or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 105. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this Part, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Part.

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

Subpart A—Duties of the Secretary of Labor

SEC. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

Subpart B—Contractors' Agreements

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed,

and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes

of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies involved as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided,* however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and

employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided,* That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not dis-

criminate on the grounds of race, color, creed, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

SEC. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

Subpart C—Powers and Duties of the Secretary of Labor and the Contracting Agencies

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

SEC. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

SEC. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

SEC. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

Subpart D—Sanctions and Penalties

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied

or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law; of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and

will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

SEC. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

SEC. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209(a)(6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary

of Labor, or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agent which imposed the sanction.

Subpart E—Certificates of Merit

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers of labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all con-

struction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such

application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The Term "applicant"' as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

SEC. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause

(1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided,* That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—MISCELLANEOUS

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

SEC. 403. (a) Executive Orders Nos. 10590 (January 19, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

SEC. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

SEC. 405. This Order shall become effective thirty days after the date of this Order.

LYNDON B. JOHNSON

THE WHITE HOUSE

September 24, 1965

APPENDIX F

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20548

August 5, 1969

B-163026
[49 Published Comp. Gen.—]

Dear Mr. Secretary:

We refer to an order issued June 27, 1969, to the heads of all agencies by the Assistant Secretary for Wage and Labor Standards, Department of Labor. The order announced a revised Philadelphia Plan (effective July 18, 1969) to implement the provisions of Executive Order 11246 and the rules and regulations issued pursuant thereto which require a program of equal employment opportunity by contractors and subcontractors on both Federal and federally assisted construction projects.

Questions have been submitted to our Office by members of Congress, both as to the propriety of the revised Philadelphia Plan and the legal validity of Executive Order 11246 and of various implementing regulations issued thereunder both by your Department and by other agencies. In view of possible conflicts between the requirements of the Plan and the provisions of Titles VI and VII of the Civil Rights Act of 1964, Pub. L. 88-352, discussions have been held between representatives of our Office, your Department, and the Department of Justice, and your Solicitor has furnished to us a legal memorandum in support of the authority for issuance of the Executive Order as well as the revised Philadelphia Plan promulgated thereunder.

The memorandum presents the following points in support of the legal propriety of the Plan:

I. The Executive has the authority and the duty to require employers who do business with the Government to provide equal employment opportunity.

II. The passage of the Civil Rights Act of 1964 did not deprive the President of the authority to regulate, pursuant to Executive Orders, the employment practices of Government contractors.

III. The revised Philadelphia Plan is lawful under the Federal Government's procurement policies, is authorized under Executive Order 11246 and the implementing regulations and is lawful under Title VII of the Civil Rights Act of 1964.

Without conceding the validity of all of the arguments advanced under points I and II, we accept the authority of the President to issue Executive Order 11246, and the contention that the Congress in enacting the Civil Rights Act did not intend to deprive the President of all authority to regulate employment practice of Government contractors.

The essential questions presented to this Office by the revised Philadelphia Plan, however, are (1) whether the Plan is compatible with fundamentals of the competitive bidding process as it applies to the awarding of Federal and federally assisted construction contracts, and (2) whether imposition of the specific requirements set out therein can be regarded as a legally proper implementation of the public policy to prevent discrimination in employment, which is declared in the Civil Rights Act and is inherent in the Constitution, or whether those requirements so far transcend the policy of nondiscrimination, by making race or national origin a determinative factor in employment, as to conflict with the limitations expressly imposed by the act or with the basic constitutional concept of equality.

Our interest and authority in the matter exists by virtue of the duty imposed upon our Office by the Congress to audit all expenditures of appropriated funds, which necessarily involves the determination of the legality of such expenditures, including the legality of contracts obligating the Government to payment of such funds. Authority has

been specifically conferred on this Office to render decisions to the heads of departments and agencies of the Government, prior to the incurring of any obligations, with respect to the legality of any action contemplated by them involving expenditures of appropriated funds, and this authority has been exercised continuously by our Office since its creation whenever any question as to the legality of a proposed action has been raised, whether by submission by an agency head, or by complaint of an interested party, or by information coming to our attention in the course of our other operations.

The incorporation into the terms of solicitations for Government contracts of conditions or requirements concerning wages and other employment conditions or practices has been a frequent subject of decisions by this Office, many of which will be found enumerated in our decision at 42 Comp. Gen. 1. The rule invariably applied in such cases has been that any contract conditions or stipulations which tend to restrict the full and free competition required by the procurement laws and regulations are unauthorized, unless they are reasonably requisite to the accomplishment of the legislative purposes of the appropriation involved or other law. Furthermore, where the Congress in enacting a statute covering the subject matter of such conditions has specifically prohibited certain actions, no administrative authority can lawfully impose any requirements the effect of which would be to contravene such prohibitions. It is within the framework of these principles that we consider the order promulgating the revised Philadelphia Plan.

The Assistant Secretary's order states the policy of the Office of Federal Contract Compliance (OFCC) that no contracts or subcontracts shall be awarded for Federal and federally assisted construction in the Philadelphia, Pennsylvania, area (including the counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia) on projects whose cost exceeds $500,000 unless the bidder submits an

acceptable affirmative action program which shall include specific goals of minority manpower utilization, meeting the standards included in the invitation or other solicitations for bids, in trades utilizing the seven classifications of employees specified therein.

The order further relates that enforcement of the nondiscrimination and affirmative action requirements of Executive Order 11246 has posed special problems in the construction trades; that contractors and subcontractors must hire a new employee complement for each construction job and out of necessity or convenience they rely on the construction craft unions as their prime or sole source of their labor; that collective bargaining agreements and/or established custom between construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; that even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter, most people working the specified classifications are referred to the jobs by the unions; and that because of these hiring arrangements, referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction.

It is also stated that because of the exclusionary practices of labor organizations, there traditionally have been only a small number of Negroes employed in the seven trades, and that unions in these trades in the Philadelphia area still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few Negroes being referred for employment. The OFCC found, therefore, that special measures requiring bidders to commit themselves to specific goals of minority manpower utilization were needed to provide equal employment opportunity in the seven trades.

Section 7 of the Assistant Secretary's order of June 27 indicates that the revised Plan is to be implemented by including in the solicitation for bids a notice substantially similar to one labeled "Appendix" which is attached to the order. Such notice would state the ranges of minority manpower utilization (as determined by the OFCC Area Coordinator in cooperation with the Federal contracting or administering agencies in the Philadelphia area) which would constitute an acceptable affirmative action program, and would require the bidder to submit his specific goals in the following form:

Identification of Trade	Est. Total Employment for the Trade on the Contract	Number of Minority Group Employees

Participation in a multi-employer program approved by OFCC would be acceptable in lieu of a goal for the trade involved in such program.

The notice also provides that the contractor will obtain similar goals from his subcontractors who will perform work in the involved trades, and that "Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in Section 6 of the Order * * *." Since Section 6 of the order contains nothing relative to "failure," we assume the intended reference is to Section 8, which reads as follows:

> *"Post-Award Compliance*
>
> "a. Each agency shall review contractors' and subcontractors' employment practices during the performance of the contract. If the goals set forth in the affirmative action program are being met, the contractor or subcontractor will be presumed to be in compliance with the requirements of Executive Order 11246, as amended, unless it comes to the agency's

attention that such contractor or subcontractor is not providing equal employment opportunity. In the event of failure to meet the goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. In any proceeding in which such good faith performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions. Where the agency finds that the contractor or subcontractor has failed to comply with the requirements of Executive Order 11246, the implementing regulations and its obligations under its affirmative action program, the agency shall take such action and impose such sanctions as may be appropriate under the Executive Order and the regulations. Such noncompliance by the contractor or subcontractor shall be taken into consideration by Federal agencies in determining whether such contractor or subcontractor can comply with the requirements of Executive Order 11246 and is therefore a 'responsible prospective contractor' within the meaning of the Federal procurement regulations.

"b. It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. It is the long-standing uniform policy of OFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in Federally-involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246, as amended, such contractors cannot be considered to be in compliance with Executive Order 11246, as amended, or the implementing rules, regulations and orders."

It is our opinion that the submission of goals by the successful bidder would operate to make the requirement

for "every good faith effort" to attain such goals a part of his contractual obligation upon award of a contract. The provisions of Section 8 of the order would therefore become a part of the contract specifications against which the contractor's performance would be judged in the event he fails to attain his stated goals, just as must as his stated goals become a part of the contract specifications against which his performance will be judged in the event he does attain his stated goals.

As indicated at page 4 of the order, the original Philadelphia Plan was suspended because it contravened the principles of competitive bidding. Such contravention resulted from the imposition of requirements on bidders, after bid opening, which were not specifically set out in the solicitation. The present statements of a specific numerical range into which a bidder's affirmative action goals must fall is apparently designed to meet, and reasonbly satisfies, the requirement for specificity.

However, we have serious doubts covering the main objective of the Plan, which is to require bidders to commit themselves to make every good faith effort to employ specified numbers of minority group tradesmen in the performance of Federal and federally assisted contracts and subcontracts.

The pertinent public policy with respect to employment practices of an employer which may be regarded as constituting unlawful discrimination is set out in Titles VI and VII of the Civil Rights Act. Title VI, concerning federally assisted programs, provides in section 601 (42 U.S.C. 2000d) that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

Section 703(a) (42 U.S.C. 2000e-2(a)) of Title VII states the public policy concerning employer employment prac-

tices by declaring it to be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. Section 705(a) (42 U.S.C. 2000e-4(a)) creates the Equal Employment Opportunity Commission, and section 713(a), Rules and Regulations (42 U.S.C. 2000e-12(a)), provides that the Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of that title.

The public policy regarding labor organization practices is delineated in section 703(c) (42 U.S.C. 2000e-2(c)) wherein it is stated that it shall be an unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of that section.

Whether the provisions of the Plan requiring a bidder to commit himself to hire—or make every good faith effort to hire—at least the minimum number of minority group employees specified in the ranges established for the des-

ignated trades is, in fact, a "quota" system (and therefore admittedly contrary to the Civil Rights Act) or is a "goal" system, is in our view largely a matter of semantics, and tends to divert attention from the end result of the Plan—that contractors commit themselves to making race or national origin a factor for consideration in obtaining their employees.

We view the imposition of such a requirement on employers engaged in Federal or federally assisted construction to be in conflict with the intent as well as the letter of the above provisions of the act which make it an unlawful employment practice to use race or national origin as a basis for employment. Further, we believe that requiring an employer to abandon his customary practice of hiring through a local union because of a racial or national origin imbalance in the local unions and, under the threat of sanctions, to make "every good faith effort" to employ the number of minority group tradesmen specified in his bid from sources outside the union if the workers referred by the union do not include a sufficient number of minority group personnel, are in conflict with section 703(j) of the act (42 U.S.C. 2000e-2(j)) which provides as follows:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group *on account of an imbalance which may exist with respect to the total number or percentage of persons* of any race, color, religion, sex, or national origin employed by any employer, *referred or classified for employment by any employment agency or labor organization*, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex,

or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." (Underscoring added.)

While the legislative history of the Civil Rights Act is replete with statements by sponsors of the legislation that Title VII prohibits the use of race or national origin as a basis for hiring, we believe a reference to a few of such clarifying explanations will suffice to further show the specific intent of Congress in such respect when enacting that title. At page 6549, Volume 110, Part 5, of the Congressional Record, the following explanation by Senator Humphrey is set out:

"* * * As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision if it would have any harmful effect on unions. The truth is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII.

"The able Senators in charge of title VII (Mr. Clark and Mr. Case) will comment at greater length on this matter.

"Contrary to the allegations of some opponents of his title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or *to achieve a certain racial balance.*

"That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion." (Emphasis added.)

In an interpretative memorandum of Title VII submitted jointly by Senator Clark and Senator Case, floor

managers of that legislation in the Senate, it is stated (page 7213, Volume 110, Part 6, Congressional Record):

"With the exception noted above, therefore, section 704 prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

"There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, *whatever such a balance may be,* would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.

"There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been

discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)" (Emphasis added).

At page 7218 of Volume 110 the following objections, which had been raised during debate to the provisions of Title VII, and answers thereto by Senator Clark are printed:

"Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.

"Answer: Nothing in the bill will interfere with merit, hiring, or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote.

* * * * *

"Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

"Answer: Quotas are themselves discriminatory."

While, as indicated above, we believe that the provisions of the Plan affecting employers who hire through unions conflict with section 703(j) of Title VII, and that the above statement by Senator Humphrey further indicates that the act was not intended to affect valid collective bargaining agreements, we further believe that the appropriate direction of any administrative action to be taken where it is the policy of a union to refer only white workers to em-

ployers on Federal or federally assisted construction is indicated in the following question and answer set forth in the interpretative memorandum by Senator Clark and Senator Case (page 7217, Volume 110):

> "Question. If an employer obtains his employees from a union hiring hall through operation of his labor contract is he in fact the true employer from the standpoint of discrimination because of race, color, religion, or national origin when he exercises no choice in their selection? If the hiring hall sends only white males is the employer guilty of discrimination within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.
>
> "Answer. An employer who obtains his employees from a union hiring hall through operation of a labor contract is still an employer. If the hiring hall discriminates against Negroes, and sends him only whites, he is not guilty of discrimination—but the union hiring hall would be."

We believe it is especially pertinent to note that the "Findings" stated in section 4 of the order of June 27 as the basis for issuance thereof, consist almost entirely of a recital of practices of *unions,* rather than of contractors or employers. Thus, in attempting to place upon the contractors the burden of overcoming the effects of union practices, the order appears to evince a policy in conflict with the interpretation of the legislation as stated by its sponsors.

In this connection your Solicitor's memorandum contends that the principle of imposing affirmative action programs on contractors for employment of administratively determined numbers of minority group tradesmen, when such programs are for the purpose of correcting the effects of discrimination by unions prior to the Civil Rights Act

of 1964, is supported by the decisions in *Quarles* v. *Philip Morris,* 279 F. Supp. 505; *U.S.* v. *Local 189, U.P.P. and Crown Zellerbach Corp.,* 282 F. Supp. 39; and *Local 53 of Heat and Frost Insulators* v. *Vogler,* 407 F. 2d 1047. We find, however, that decisions of the courts have differed materially in such respect; see *Griggs* v. *Duke Power,* 292 F. Supp. 243; *Dobbins* v. *Local 212,* 292 F. Supp. 413; and *U.S.* v. *Porter,* 296 F. Supp. 40.

Additionally, your Solicitor's memorandum cites cases involving affirmative desegregation of school faculties (*U.S.* v. *Jefferson County,* 372 F. 2d 836 (1966), and *U.S.* v. *Montgomery County,* 289 F. Supp. 647, affirmed 37 LW 4461 (1969) in particular). However, there is a clear distinction between the factual and legal situations involved in those cases and the matter at hand. The cited school decisions required reallocation of portions of existing school faculties in implementation of the requirement for desegregation of dual public school systems, which had been established on the basis of race, as such requirement was set out in the 1954 and 1955 decisions of the Supreme Court in the *Brown* v. *Board of Education* cases (347 U.S. 483 and 349 U.S. 294). In the *Brown* cases desegregation of faculties was regarded as one of the keys to desegregation of the schools, and in the *Jefferson County* case the court read Title VI of the Civil Rights Act as a congressional mandate for a change in pace and method of enforcing the desegregation of racially segregated school systems, as required by the *Brown* decisions.

The requirements of the revised Philadelphia Plan do not involve a comparable situation. Even if the present composition of an employer's work force or the membership of a union is the result of past discrimination, there is no requirement imposed by the Constitution, by a mandate of the Supreme Court, or by the Civil Rights Act for an employer or a union to affirmatively desegregate its personnel or membership. The distinction becomes more

apparent when it is recognized that the order of June 27 pertains to *hiring* practices of an employer. Hiring was not at issue in the school cases, and those cases do not purport to hold that a school district must, or even may, correct a racial imbalance in its faculty by affirmatively requiring that a stated proportion of its teachers shall be hired on the basis of race. To the contrary, the court recognized in its decision in the *Jefferson County* case (page 884) that the "mandate of Brown * * * forbids the discriminatory consideration of race in faculty selection," and such consideration is expressly prohibited by section VIII of the court's decree in Appendix A of that case.

The recital in section 6b.2 of the order (and in the prescribed form of notice to be included in the invitation) that the contractor's commitment "is not intended and shall not be used to discriminate against any qualified applicant or employee" is in our opinion the statement of a practical impossibility. If, for example, a contractor requires 20 plumbers and is committed to a goal of employment of at least five from minority groups, every nonminority applicant for employment in excess of 15 would, solely by reason of his race or national origin, be prejudiced in his opportunity for employment, because the contractor is committed to make every effort to employ five applicants from minority groups.

In your Solicitor's memorandum it is argued that the "straw man" sometimes used in opposition to the Plan is that it "would require a contractor to discriminate against a better qualified white craftsman in favor of a less qualified black." We believe this obscures the point involved, since it introduces the element of skill or competence, whereas the essential question is whether the Plan would require the contractor to select a black craftsman over an *equally* qualified white one. We see no room for doubt that the contractor in the situation posed above would believe he would be expected to employ the black applicant,

at least until he had reached his goal of five nonminority group employees, and that if he failed to achieve that goal his employment of a white craftsman when an equally qualified black one was available could be considered a failure to use "every good faith effort." In our view such preferential status or treatment would constitute discrimination against the white worker solely on the basis of color, and therefore would be contrary to the express prohibition both of the Civil Rights Act and of the Executive order.

It is also contended in your Solicitor's memorandum that substantial judicial support for administrative affirmative action programs requiring commitments for contractors for employment of specified numbers of minority group tradesmen is contained in the decision of the Ohio Supreme Court in *Weiner* v. *Cuyahoga Community College District,* 19 Ohio St. 2d — (July 2, 1969). That decision upheld the award of a federally assisted construction contract to the second low bidder, as a proper action in implementation of the policies of the Civil Rights Act of 1964, after approval of award to the low bidder was withheld by the Federal agency involved for failure of the low bidder to submit an affirmative action program (including manning tables for minority group tradesmen) which was acceptable to that agency pursuant to an OFCC plan established for Cleveland, Ohio.

While the decision in *Weiner* case (which was a majority opinion by five of the justices with dissenting opinions by two) has some bearing on the issues here involved, since the decision appears to be based in substantial part on the conflicting opinions of Federal courts cited earlier, we do not believe the decision can be considered as controlling precedent for the validity of the revised Philadelphia Plan.

In support of the required procedure, which is admitted at page 33 of the Solicitor's memorandum to require contractors to take actions which are based on race, the memorandum relies upon the acceptance by the courts, in school, housing and voting cases, of the use of race as a valid con-

sideration in fashioning relief to overcome the effects of past discrimination. Aside from other distinctions, we believe there is a material difference between the situation in those cases, where enforcement of the rights of the minority individuals to vote or to have unsegregated educational or housing facilities does not deprive any member of a majority group of his rights, and the situation in the employment field, where the hiring of a minority worker, as one of a group whose number is limited by the employer's needs, in preference to one of the majority group precludes the employment of the latter. In other words, in those cases there is present no element of reverse discrimination, but only the correction of the illegal denial of minority rights, leaving the majority in the full exercise and enjoyment of their corresponding rights.

In addition it may be pointed out that in those cases the judicial relief ordered is directed squarely at the parties responsible for the denial of rights, and we therefore do not consider them as supporting requirements to be complied with by contractors who, under the findings of the Plan, are themselves more the victims than the instigators of the past discriminatory practices of the labor unions. Moreover, in the court cases the remedies are applied after judicial determination that effective discrimination is in fact being practiced or fostered by the defendants, whereas the Plan is a blanket administrative mandate for remedial action to be taken by all contractors in an attempt to cure the evils resulting from union actions, without specific reference to any past or existing actions or practices by the contractors.

While it may be true, as stated in the Plan, "that special measures are required to provide equal employment opportunity in these seven trades," it is our opinion that imposition of a responsibility upon Government contractors to incur additional expenses in affirmative action programs which are directed to overcoming the present effects of past

discrimination by labor unions, would require the expenditure of appropriated funds in a manner not contemplated by the Congress. If, as stated in the Plan, discrimination in referral is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, it is our opinion that the remedies provided by the Congress in those acts should be followed. See also in this connection section 207 of Executive Order 11246.

While, as indicated in the foregoing opinions and in your Solicitor's memorandum, the President is sworn to "preserve, protect and defend the Constitution of the United States," we question whether the executive departments are required, in the absence of a definitive and controlling opinion by the Supreme Court of the United States, to assess the relative merits of conflicting opinions of the lower courts, and embark upon a course of affirmative action, based upon the results of such assessment, which appears to be in conflict with the expressed intent of the Congress in duly enacted legislation on the same subject.

In this connection, it should be noted that, while the phrase "affirmative action" was included in the Executive order (10925) which was in effect at the time Congress was debating the bills which were subsequently enacted as the Civil Rights Act of 1964, no specific affirmative action requirements of the kind here involved had been imposed upon contractors under authority of that Executive order at that time, and we therefore do not think it can be successfully contended that Congress, in recognizing the existence of the Executive order and in failing to specifically legislate against it, was approving or ratifying the type or methods of affirmative action which your Department now proposes to impose upon contractors.

We recognize that both your Department and the Department of Justice have found the Plan to be legal and we have given most serious consideration to their positions. However, until the authority for any agency to impose or

require conditions in invitations for bids on Federal or federally assisted construction which obligate bidders, contractors, or subcontractors, to consider the race or national origin of their employees or prospective employees for such construction, is clearly and firmly established by the weight of judicial precedent, or by additional statutes, we must conclude that conditions of the type proposed by the revised Philadelphia Plan are in conflict with the Civil Rights Act of 1964, and we will necessarily have to so construe and apply the act in passing upon the legality of matters involving expenditures of appropriated funds for Federal or federally assisted construction projects.

In this connection it is observed that by section 705(d) of the act, Congress charges the Equal Employment Opportunity Commission with the specific responsibility of making reports to the Congress and to the President on the cause of and means of eliminating discrimination and making such *recommendations for further legislation* as may appear desirable. That provision, we believe, not only prescribes the procedure for correcting any deficiencies in the Civil Rights Act, but also shows the intent of Congress to reserve for its own judgment the establishment of any additional unlawful employment practice categories or nondiscrimination requirements, or the imposition upon employers of any additional requirements for assuring equal employment opportunities.

We realize that our conclusions as set out above may disrupt the programs and objectives of your Department, and may cause concern among members of minority groups who may believe that racial balance or equal representation on Federal and federally assisted construction projects is required under the 1964 act, the Executive order, or the Constitution. Desirable as these objectives may be, we cannot agree to their attainment by the imposition of requirements on contractors, in their performance of Federal or federally assisted contracts, which the Congress has spe-

cifically indicated would be improper or prohibited in carrying out the objectives and purposes of the 1964 act.

Sincerely yours,

/s/ ELMER B. STAATS
Comptroller General of the United States

The Honorable
The Secretary of Labor